

2009

Denny Carradine v. Utah Labor Commission, Workers Compensation Fund, Employers Reinsurance Fund : Brief of Appellant

Utah Court of Appeals

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Shawn W. Potter; Powell, Potter and Poulsen; Attorney for Defendants-Appellees.

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IN THE UTAH COURT OF APPEALS

DENNY CARRADINE, Petitioner/Appellant, v. UTAH LABOR COMMISSION, WORKERS COMPENSATION FUND, EMPLOYERS REINSURANCE FUND Respondents/Appellees	BRIEF OF THE APPELLANT Appellate Case No. 20090907
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APPEAL FROM THE ORDER OF
THE UTAH LABOR COMMISSION

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Labor Commission	

FILED
UTAH APPELLATE COURTS
NOV 29 2010

IN THE UTAH COURT OF APPEALS

<p>DENNY CARRADINE,</p> <p>Petitioner/Appellant,</p> <p>v.</p> <p>UTAH LABOR COMMISSION, WORKERS COMPENSATION FUND, EMPLOYERS REINSURANCE FUND</p> <p>Respondents/Appellees</p>	<p>BRIEF OF THE APPELLANT</p> <p>Appellate Case No. 20090907</p>
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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to §78A-4-103 (2) (a) UTAH CODE ANNOTATED 1953 as amended. The Utah Court of Appeals has jurisdiction of matters appealed from the Utah Labor Commission.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Labor Commission erred in its refusal to accept evidence or re-open the hearing regarding the time period of Petitioner's gainful employment when Petitioner suffered a seizure in the hearing itself and was unable to testify regarding the same. The Court applies an "intermediate standard of review, deferring to an agency's interpretation as long as it is both reasonable and rational..." *Westside Dixon Associates LLC v. Utah Power & Light Co./PacifiCorp*, 44 P.3d 775 (Utah,2002). See also *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah,2007), citing § 63-46b-16(4)(d) (Utah Code Ann.): The Utah Administrative Procedures Act allows relief when "the agency has erroneously interpreted or applied the law." This matter was preserved for appeal in Petitioner's Motion for Review. Record, p. 166-167. It was also preserved for appeal in Petitioner's Motion for Reconsideration. Record, p. 189-190.

Whether the Labor Commission erred in establishing, as a factual matter, the last date of gainful employment based on the facts received. The standard of review is substantial evidence. *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah,2007), citing § 63-46b-16(4)(g): Subsection (4)(g)

allows relief when “the agency action is based on a determination of fact ... that is not supported by substantial evidence when viewed in light of the whole record before the court.” Id. This issue was preserved for appeal in the Medical Panel Report which states: “Mr. Carradine has not worked since the 09-02-88 injury.” Record, p. 100. It is also in the Medical Record Exhibit: “Mr. Carradine stated that he has been unable to work since 1991.” Medical Record Exhibit p. 44.

Whether the Labor Commission erred in refusing to accept post-hearing evidence of Petitioner’s time of any gainful employment under the Labor Commission’s continuing jurisdiction over workers compensation claims. Statutory interpretations by agencies are reviewed for correctness, giving no deference to the agency’s interpretation...” *Employers’ Reinsurance Fund v. Industrial Com’n of Utah*, 856 P.2d 648 (Utah Ct.App.,1993). See also *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah,2007), citing § 63-46b-16(4)(d) (Utah Code Ann.): The Utah Administrative Procedures Act allows relief when “the agency has erroneously interpreted or applied the law.” This matter was preserved for appeal in Petitioner’s Motion for Review. Record, p. 166-167. It was also preserved for appeal in Petitioner’s Motion for Reconsideration. Record, p. 189-190, “The Labor Commisison has ongoing jurisdiction to determine Petitioner’s employment for the period between the original injury in 1998, the prior final adjudication in 1992, and 2000.”

STANDARDS OF REVIEW

This appeal is from an order of the Utah Labor Commission. The Court applies an

“intermediate standard of review, deferring to an agency's interpretation as long as it is both reasonable and rational...” *Westside Dixon Associates LLC v. Utah Power & Light Co./PacifiCorp*, 44 P.3d 775 (Utah, 2002). *See also Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah, 2007), *citing* § 63-46b-16(4)(d) (Utah Code Ann.): The Utah Administrative Procedures Act allows relief when “the agency has erroneously interpreted or applied the law.”

With regard to the agency's review of evidence, the standard of review is substantial evidence. *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah, 2007), *citing* § 63-46b-16(4)(g): Subsection (4)(g) allows relief when “the agency action is based on a determination of fact ... that is not supported by substantial evidence when viewed in light of the whole record before the court.” *Id.*

Statutory interpretations by agencies are reviewed for correctness, giving no deference to the agency's interpretation...” *Employers' Reinsurance Fund v. Industrial Com'n of Utah*, 856 P.2d 648 (Utah Ct.App., 1993). *See also Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah, 2007), *citing* § 63-46b-16(4)(d) (Utah Code Ann.): The Utah Administrative Procedures Act allows relief when “the agency has erroneously interpreted or applied the law.”

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner established that he is permanently and totally disabled under the Workers Compensation statutes. The key issue in this case is Petitioner's last date of gainful

employment. Petitioner maintains that the Labor Commission erred in not using the best evidence in the record to set the date, erred in not allowing additional evidence to be taken to set the date, and erred by putting procedure over the stated purpose of the workers compensation act: "The [Workers Compensation] Act is a humanitarian and economical system designed to provide relief to the victims of industrial accidents..." *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 585 (Utah Ct. App., 1998).

B. Course of the Proceedings & Disposition of the Case

At Petitioner's hearing, Petitioner had a seizure and was unable to testify at all and therefore was unable to provide testimony regarding his employment history and gainful employment. An expert neuropsychologist, Dr. Mary Hales, testified at the hearing regarding Petitioner's neurological/psychological injuries. At the time of the hearing Dr. Hales had performed all testing of Petitioner but had not yet prepared a written report. Dr. Hales' written report was submitted to Judge Marlowe and all other parties on November 15, 2006 and became part of the record. The report stated, among other things, that Petitioner has been unable to work since 1991 (See page 5 of Neuropsychological Evaluation by Dr. Mary Hales). The matter was submitted to a medical panel. Due to Petitioner's neurological/psychological disability, he was unable to meet with the medical panel and Petitioner's case was dismissed without prejudice. Petitioner refiled the matter (Case No. 07-0490), and Judge Marlowe required, in an October 12, 2007, letter, that she would not allow evidence "which was available at the time of the prior hearing, but not presented." The matter then went to the medical panel.

The medical panel determined that Petitioner's current condition was an extension of his previously adjudicated brain and psychological injury. The medical panel also stated that Petitioner last worked in 1988 (*See* page 3 of Goldman Report). Judge Marlowe issued a Findings of Fact and Conclusions of Law on September 30, 2008, establishing that petitioner was permanently and totally disabled as a result of the original industrial injury. On approximately November 10, 2008, the Employers Reinsurance Fund ("ERF") filed a letter requesting amendments to the September 30, 2008 Order. Separately, on November 17, 2008, the ERF filed a formal Motion for Review regarding the factual issue of payment of certain benefits. The Workers Compensation Fund ("WCF") joined the motion to modify other fact issues, including amounts paid to Petitioner over time. At a later point in time, Petitioner discovered that the date established by Judge Marlowe as the date from which his benefits would be paid was in error as he had only been intermittently and not gainfully employed since 1992. Petitioner then filed his own Motion for Review seeking to re-open the hearing to allow the acceptance of evidence regarding dates of gainful employment prior to July 2000. The Motion was denied and Petitioner filed a Request for Reconsideration attaching an affidavit regarding dates of employment –which was also denied. Petitioner continues to maintain that he was not gainfully employed between the date of the injury, the 1992 Industrial Commission Proceedings, and July 2000, and that he should be compensated for that time period.

C. Statement of the Facts

Petitioner Denny Carradine suffered a severe knee injury when he fell from a ladder at work for his own company on September 2, 1988. Petitioner received workers compensation benefits and engaged in rehabilitation efforts. In January, 1989, while attending a rehabilitation appointment, he slipped on ice and suffered a substantial shoulder injury. As treatment for the shoulder injury Carradine received two steroid shots, after one of which he suffered a neurological/psychological injury. Carradine made a claim at the Utah Industrial Commission and he was adjudicated permanently partially disabled. See Findings of Fact and Conclusions of Law and Order, Issued June 5, 1992, by Judge Barbara Elicerio at page 4, attached hereto. Carradine was able to obtain some work after the injury, but it was not gainful employment. Before his accident and for a short time after, from 1982-1990, Carradine had a real estate license. *read* He had to not renew the license because he could no longer do the things required of a real estate agent including: writing, spelling, tracking business, and providing customer service. For several years, he was able to collect some rent from properties that he owned, but was unable to survive on the income generated from rental properties and was forced to take loans against his properties and eventually sell some of his properties. In 1997 he worked for his brother for only a short time as a carpenter's helper, but was fired after two months because he was incapable of doing the work. From 1998-2000, Carradine worked for Cressfarms, LLC as a project manager. Carradine was given this job as a favor from a friend. For a period he lived on the Cressfarms property. After a falling out with his friend he was no longer employed.

Petitioner's neurological/psychological condition and memory continued to worsen and in March, 2005, Petitioner filed a claim for permanent total disability (Case No. 05-0292).

SUMMARY OF THE ARGUMENTS

The Labor Commission should have acknowledged the more reliable dates of Petitioner's last date of gainful employment in the record or alternatively, should have allowed the reopening of the hearing to take testimony regarding Petitioner's last date of gainful employment. The Utah Labor Commission has ongoing jurisdiction over all claims of permanent total disability even if they have already been adjudicated. In *Color Country Management v. Labor Com'n*, 38 P.3d 969, 974-75 (Utah App. 2001), the Utah Court of Appeals stated that "[w]orkers' compensation claims are best viewed as a process, rather than as a discrete event, and the Commission ha[s] continuing jurisdiction over...claims. See Utah Code Ann. § 34A-2-420(1)(a) (2009) (stating that "[t]he powers and jurisdiction of the commission over each case shall be continuing." Under the circumstances, where ERF and WCF each separately sought to amend the Labor Commission's findings of fact and conclusions of law, after the hearing, and it was allowed, it is unfair to deny Petitioner the right to also amend the Labor Commission's ruling or to re-open the hearing for the purpose of taking evidence. Particularly where it is the Labor Commission's duty and the Court of Appeals' requirement to "resolve '[a]ny doubt respecting the right of compensation in favor of the injured employee.' " *Ae*

Clevite, Inc. v. Labor Com'n, 996 P.2d 1072, 1074 (Utah Ct. App., 2000), citing *Drake v. Industrial Comm'n*, 939 P.2d 177, 182 (Utah 1997).

ARGUMENTS

I. The Labor Commission erred in its refusal to accept evidence or re-open the hearing regarding the time period of Petitioner's gainful employment when Petitioner suffered a seizure in the hearing itself and was unable to testify regarding the same.

The Utah Labor Commission has ongoing jurisdiction of any worker's compensation claims regardless if they have already been adjudicated. In *Color Country Management v. Labor Com'n*, 38 P.3d 969, 974-75 (Utah App. 2001), the Utah Court of Appeals stated that "[w]orkers' compensation claims are best viewed as a process, rather than as a discrete event, and the Commission ha[s] continuing jurisdiction over...claims. See Utah Code Ann. § 34A-2-420(1)(a) (2009) (stating that "[t]he powers and jurisdiction of the commission over each case shall be continuing." This appeal is for the purpose of requiring the Labor Commission to allow the receipt of clarifying facts and providing evidence that Carradine was *not gainfully* employed after his injury in 1988 and after the prior final adjudication in 1992, as he did not have the ability to testify of the same at the hearing.

The ALJ cited *United Airlines v. Industrial Commission*, 175, P.2d 752, 754 (Utah 1946) as justifying her decision to not allow Carradine to submit new evidence regarding his employment after the 1988 accident. In *United Airlines*, the Utah Supreme Court held that "[t]he Industrial Commission should not reopen a case merely for the purpose of hearing cumulative or corroborative evidence; *but when new evidence is available...then*

their *power to reconsider the case is not curtailed.*” *Id.* (emphasis added). The ALJ stated in her Order that Carradine “last worked sometime in July 2000 and a more precise date was not put into evidence.” See record page 00182. Submitting *new*, more precise, *evidence* that Carradine was not gainfully employed after the injury and after the prior adjudication in 1992, would not be excluded under *United Airlines*. The new evidence submitted to the ALJ as the Affidavit of Denny Carradine identifies with particularity his employment activities between his original 1988 injury, the prior final adjudication in 1992, and his last date of any employment in 2000. As a matter of fairness, re-opening the hearing would allow Petitioner to be cross-examined regarding the dates of his employment.

The Labor Commission’s administrative rules appear to require the ALJ to reopen the hearing after a motion for review. When a motion for review is filed the:

Administrative Law Judge *shall*:

- a. Reopen the case and enter a Supplemental Order after holding such further hearing and receiving such further evidence as may be deemed necessary;
- b. Amend or modify the prior Order by a Supplemental Order; or
- c. Refer the entire case for review under Section 34A-2-801, Utah Code.

R602-2-1 (M) (1) (a) Utah Admin. Code (emphasis added). Clearly the ALJ was able, under the rules, to hold a “further hearing” to receive “further evidence.”

The ALJ’s refusal does not meet the “reasonable and rational” standard required under *Westside Dixon Associates LLC v. Utah Power & Light Co./PacifiCorp*, 44 P.3d 775 (Utah, 2002). It is not reasonable to deny Petitioner the opportunity to present evidence, when it is within the ALJ’s control to allow it –particularly where “The purpose of the Workers’ Compensation Act is to protect employees who sustain injuries

arising out of their employment by affording financial security during the resulting period of disability.” *Wilstead v. Industrial Commission*, 17 Utah 2d 214, 407 P.2d 692 (1965).

“To give effect to that purpose, the Act should be liberally construed and applied to provide coverage. Any doubt respecting the right of compensation will be resolved in favor of the injured employee.” *McPhie v. Industrial Commission*, 567 P.2d 153 (Utah 1977). Because the key issue in this matter is when Petitioner’s “period of disability” began, the ALJ should have reopened the hearing to take such limited evidence because such doubts should be resolved in favor of the injured employee.

II. The Labor Commission erred in establishing, as a factual matter, the last date of gainful employment based on the facts received.

“To successfully challenge an agency’s factual findings, the party “must marshal [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.” *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah,2007), citing *Grace Drilling Co. v. Bd. of Review of Indus. Comm’n*, 776 P.2d 63, 68 (Utah Ct.App.1989). “This requires counsel to construct the evidence supporting the adversary’s position, and then “ferret out a fatal flaw in the evidence.” *Id.*, citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991). The adversary’s position, and the ruling of the ALJ was that Mr. Carradine was last able to work in July 2000. All of the evidence relied on by the ALJ in establishing Mr. Carradine’s last date of gainful employment was cited in the July 27, 2009, Order:

First, the ALJ referred to the original applications:

On the application for hearing, in answer to question No. 4 about time off work, the Petitioner replied that his time off work had been intermittent since the day of injury "to present." On the accompanying forms, he indicated "Applicant was employed until approximately 2001. Applicant has sought casual employment on occasion but has not been able to remain employed.

See record pages 00181 - 00182. The other evidence relied on by the ALJ in establishing the last date of gainful employment was a statement by Mr. Carradine's counsel:

Judge: Mr. Potter what day does the claim start? From what day is the Petitioner claiming perm total?"

Mr. Potter: The original, are you asking what [inaudible] it was?

Judge: OK but the application says he's worked intermittently from that date, so when are you claiming that the perm total compensation should start?

Mr. Potter: The last day of work would be 2001 and I'm [inaudible] date. [Long pause] According to [inaudible] the last date of work was July 2000.

See record page 00182. The ALJ did not rely on any other evidence to set the last date of gainful employment. In response to Carradine's Motion for Review to alternatively change the date found by the ALJ based on facts already in the record, or to reopen the hearing to take testimony on the last date of gainful employment, the ALJ scolded Carradine and his attorney for not raising this issue in response to her Findings of Fact and Interim Order dated July 31, 2006, her Amended Findings of Fact and Interim Order dated January 31, 2008, or her Findings of Fact Conclusions of Law and Order of Subsistence Benefits dated September 30, 2008.

The "fatal flaw" in the evidence is that in between these various rulings and amended rulings there were two very probative statements put into the record of evidence regarding Mr. Carradine's last date of gainful employment that were entirely ignored by the ALJ. The Medical Panel reported that Mr. Carradine "has not worked since the 09-

02-88 injury.” See record page 00100. Dr. Goldman states further: “it is significant to note that as early as 1990, he was no longer taking care of his own financial needs.” *Id.* p. 6. This information was presumably given to Dr. Goldman by Mr. Carradine himself. Mr. Carradine’s own Neuropsychological Evaluation provides “Mr. Carradine stated that he has been unable to work since 1991.” See record page 44. Neither of these reports were available at the April 26, 2006, hearing but were provided after the hearing and the ALJ quoted from and relied on both the Medical Panel Report and the Neuropsychological Evaluation in making her findings of fact and conclusions of law. There were no objections made to the Medical Panel Report or to the written Neuropsychological Evaluation from either the WCF or the ERF.

The ALJ’s statement “The Petitioner last worked sometime in July 2000 and a more precise date was not put into evidence” is inaccurate as both of the reports were put into evidence. In spite of the probative evidence from the medical panel and medical provider, the ALJ continued to rely on the statement given by counsel. The ALJ cited a statement of Mr. Carradine’s counsel at the hearing that “The last day of work would be 2001 and I’m [inaudible] date. [Long pause] According to [inaudible] the last date of work was July 2000.” See Record pages 00180-00184. Of the three dates given, the most reliable are the dates given by Mr. Carradine himself.

The Labor Commission is not bound by the Utah Rules of Evidence, but instead “may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant.” § 34A-2-802, Utah Code Ann. While Mr. Carradine could have given his testimony regarding his last gainful employment himself, he became unavailable when he

had a seizure during the course of the hearing. The two dates given by Mr. Carradine were given through the reports of medical providers which were both provided to the ALJ outside of and after the hearing of the matter. The statements regarding his last gainful employment are evidence of a material fact at issue in a hearing to determine permanent total disability. The statements of Mr. Carradine regarding his last gainful employment are more probative than any other evidence, including the statement by council. Justice would best be served by using Carradine's own statements to establish his last date of gainful employment because the purpose of workers compensation is "to provide relief to the victims of industrial accidents..." *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 585 (Utah Ct. App., 1998).

The substantial evidence favors Mr. Carradine and allows relief in this circumstance where "the agency action is based on a determination of fact ... that is not supported by substantial evidence when viewed in light of the whole record before the court." *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah, 2007), citing § 63-46b-16(4)(g). Because the ALJ's finding of fact is not supported by the substantial evidence in the record, it must be set aside. *Peck v. Eimco Process Equipment Co.*, 748 P.2d 572 (Utah 1987).

III. The Labor Commission erred in refusing to accept testimony or affidavit post-hearing evidence of Petitioner's time of any gainful employment under the Labor Commission's continuing jurisdiction over workers compensation claims.

The Labor Commission refused to re-open the hearing to receive direct testimony regarding Mr. Carradine's last date of gainful employment, based on its interpretation of § 63-46b-8 and §34A-1-303. Statutory interpretations by agencies are reviewed for

correctness, giving no deference to the agency's interpretation..." *Employers' Reinsurance Fund v. Industrial Com'n of Utah*, 856 P.2d 648 (Utah Ct.App.,1993). See also *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah,2007), citing § 63-46b-16(4)(d) (Utah Code Ann.): The Utah Administrative Procedures Act allows relief when "the agency has erroneously interpreted or applied the law." Here, the Labor Commission erroneously interpreted or applied the law.

The ALJ cited § 63-46b-8 as requiring "that ALJ's conduct evidentiary hearings 'to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their position.'" See record pages 00180-00184. The only hearing in this matter occurred on April 26, 2006, in which Mr. Carradine was unable to testify due to his seizure. There was no other opportunity to submit testimonial evidence due to the ALJ's requirement in her letter dated October 12, 2007: "the upcoming hearing is not to repeat the prior hearing and present the same witnesses and evidence (or to introduce evidence which was available at the time of the prior hearing, but not presented." (Record page 00076). By not allowing testimony at the later hearing, or in later proceedings, the ALJ did not "obtain full disclosure of relevant facts" or "afford [Mr. Carradine] reasonable opportunity to present [his] position." *Id.* Furthermore, the ALJ accepted as evidence the written Neuropsychological Examination report that was produced after the hearing. And, the ALJ accepted as evidence the Medical Panel's report that was produced after the hearing. Both reports provide a more accurate date of Petitioner's last date of gainful employment. The Labor Commission's interpretation of

§ 63-46b-8, appears to contradict the Labor Commission's duty to examine credible evidence. "The power of the Industrial Commission [predecessor of the Labor Commission] to modify awards when "in its opinion" modification is justified is not an arbitrary power, *Mecham v. Industrial Commission*, 692 P.2d 783 (Utah 1984); *Buxton v. Industrial Commission*, 587 P.2d 121 (Utah 1978), but a power wedded to the duty to examine credible evidence." *Spencer v. Indus. Comm'n of Utah*, 733 P.2d 158, 160 (Utah, 1987). The ALJ's stated procedural requirements appear to contradict the overall purpose of the Workers Compensation Act. "The [Workers Compensation] Act is a humanitarian and economical system designed to provide relief to the victims of industrial accidents..." "To give effect to that purpose, the Act should be liberally construed and applied to provide coverage. Any doubt respecting the right of compensation will be resolved in favor of the injured employee." *State Tax Comm'n v. Industrial Comm'n*, 685 P.2d 1051, 1053 (Utah 1984).

The ALJ improperly applied § 34A-1-303, stating that her decision must be based on "the evidence previously submitted in the case." Record page 00182, quoting, without citation, § 34A-1-303 (4) (c) (i). The application of this section is improper because it governs proceedings of the Labor Commissioner or the Labor Appeals board, not a motion for review before an ALJ. But, if the ALJ wanted to use said section on a motion for review, it would also have to abide by § 34A-1-303 (4) (c) (ii) which allows the Commissioner or Appeals Board to base its decision "on written argument or written *supplemental evidence* requested by the commissioner or Appeals Board." Emphasis added. Under the circumstances supplemental evidence was offered and should have

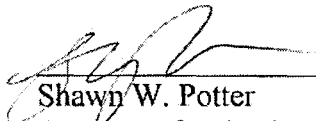
been requested to fully and finally resolve the matter.

CONCLUSION

Petitioner asks the Court to order the Labor Commission to allow Petitioner to submit evidence, that would tend to prove that he was not gainfully employed after his injury in September of 1988, the 1992 prior adjudication, and that the intermittent employment he had between those periods and 2000 was not gainful employment such that his award of permanent total disability should begin from the date of the original injury. Alternatively, Petitioner asks the Court to find, based on the facts in the record, that his last date of gainful employment was in 1988, and order the Labor Commission to revise its findings accordingly.

DATED this 21 day of November, 2010.

POWELL POTTER & POULSEN, PLLC


Shawn W. Potter
Attorneys for the Appellant

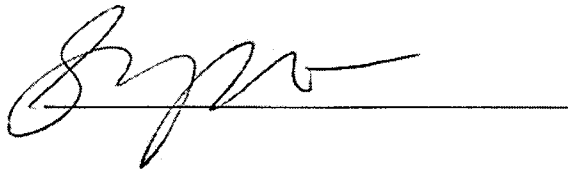
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of the Appellant, to be sent by United States Mail, postage prepaid, on this 24th day of November, 2010, as follows:

Employers Reinsurance Fund
Wendy B. Crowther, Esq.
201 South Main Street, Suite 1300
Salt Lake City, UT 84111

Workers Compensation Fund
Hans Scheffler
392 East 6400 South
Salt Lake City, UT 84107

Labor Commission 160 East 300 South
P.O. Box 146611
Salt Lake City, UT 84114



ADDENDUM

Complaint

Motion to Dismiss and Supporting Memorandum

Reply Memorandum in Support of Motion to Dismiss

Attachment A



NeuroDynamics, LLC

FAX

Date: 11/15/06

Fax Number: 435-649-2561

Company: John Potter

Attention: Bren

Pages (including Cover): 21

Comments:

☐ Urgent ☒ For Review ☐ Please Comment ☐ Please Reply

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NeuroDynamics, LLC

NEUROPSYCHOLOGICAL EVALUATION CONFIDENTIAL

PATIENT: CARRADINE (HOFFMAN), Denny Michael

DATES OF TESTING: 8/29/06, 8/31/06

FIANCE: Susie Wells

DOB: 5/7/54

ADDRESS: 578 South Redwood Road
Salt Lake City, UT 84104

C.A.: 52:3

REFERRED BY: Christy P. Kane, M.C.

EDUCATION: 11th Grade

EXAMINER: Mary K. Hales, Ph.D./Clinical Neuropsychologist

REASON FOR REFERRAL

Mr. Carradine was referred for neuropsychological testing in order to determine his current level of neurocognitive and neurobehavioral functioning. Mr. Carradine was injured in an on-the-job accident several years ago, and according to Mr. Carradine, subsequent steroid injections resulted in permanent neurologic changes. He has suffered from depression and anxiety over the past few years, and has been seen by Ms. Kane, his therapist, on a regular basis over the past two years. Ms. Kane referred Mr. Carradine for an evaluation as a result of ongoing concerns to apparent neurocognitive and neurobehavioral functioning as a result of neurologic damage.

The present neuropsychological evaluation was requested to assess Mr. Carradine's current level of intellectual and cognitive ability, to identify neurocognitive strengths and weaknesses, and to make recommendations as appropriate. At the time of the evaluation, Mr. Carradine was prescribed Gemfibrozil 600 mg b.i.d., hydrochlorothiazide 25 mg, Coreg 6.25 mg b.i.d., and Effexor 37.5 mg b.i.d.

EVALUATION PROCEDURES

Mary K. Hales, Ph.D. initially met with Mr. Carradine and Ms. Wells March 17, 2006, to review developmental, medical, and academic history. Due to funding issues, Mr. Carradine did not begin testing until August 29, 2006. A neuropsychological evaluation was administered over three sessions by Dr. Hales. Both qualitative and quantitative measures were administered. Standardized

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administration and scoring procedures were carefully followed. Dr. Hales subsequently met with Mr. Carradine and Ms. Wells September 11, 2006, to review test results and discuss recommendations generated by the evaluation.

The following procedures were included as part of the current evaluation:

Wechsler Adult Intelligence Scale-Third Edition (WAIS-III)
Wide Range Assessment of Memory and Learning-Second Edition (WRAML2)
Halstead-Reitan Neuropsychological Test Battery - selected subtests
 Lateral Dominance Examination
 Strength of Grip
 ABC Test for Ocular Dominance
 Finger Tapping Test
 Trail Making Test (Parts A and B)
Grooved Pegboard Test
Conners' Continuous Performance Test-II (CPT-II)
Wisconsin Card Sorting Test (WCST)
Writing Sample
Draw-A-Clock
Key-Osterreith Complex Figure Drawing
Wide Range Achievement Test-Revision 3 (WRAT3)
Peabody Picture Vocabulary Test-Third Edition (Form IIIB)
Test of Memory Malingering (TOMM)
Beck Depression Inventory (BDI)
Beck Anxiety Inventory (BAI)
Review of records
Clinical interview

DEVELOPMENTAL, MEDICAL, ACADEMIC HISTORY

Mr. Carradine was born March 7, 1954, in McKeys Port, Pennsylvania. He is the son of Louis Carradine and Fern Maxine Moore. Birthweight was unknown and no complications at birth were indicated. Mr. Carradine reported no history of learning disorders, school problems, or other related difficulties. He indicated that he did not meet his biological father until 1991, and he legally changed his name after that time. He has previously known as Denny Hoffman. Mr. Carradine was raised by his stepfather, Bob Codat. Mr. Carradine's biological father is still living, but his mother passed away from cancer in 1994. He reported that he has an older brother and a younger brother, as well as a younger sister, and his siblings have different fathers than himself. Mr. Carradine was 6 years of age when his step-father moved in with the family. Mr. Codat was employed as a steel worker, and his mother was a homemaker. Mr. Carradine noted that he repeated kindergarten and 1st grade due to the family's frequent moves. According to Mr. Carradine, his family never seemed to stay in one place for more than a year at a time. Mr. Carradine reported no significant health

problems in the immediate and extended family, and he also indicated no family history of psychiatric or behavior disorders such as depression/anxiety, or Attention Deficit Hyperactivity Disorder. Mr. Carradine stated that his grades were not as good as he would have liked, primarily because schoolwork was not a priority in their home and there were many family problems. He reported that his step-father was abusive to his mother, and that was difficult for him to watch. He did not report being physically or sexually abused by his stepfather or any other individual. Mr. Carradine's family moved from New Mexico to Utah, where he finished the 10th grade at West Jordan High School. He reported that school generally went well when he was in high school, but he quit high school after 10th grade and went to work to help his family. He did not complete a GED.

Mr. Carradine was employed by Holt Oil during high school. He reported that he completed real estate school where he received his real estate license and worked as a real estate agent, as well as developing a heating, air conditioning, and plumbing business, which he maintained from 1983 to 1991. He stated that he was the owner of the business, and he managed 13 people, but finally had to close the business due to problems following an accident in 1988 and subsequent neurologic and physical problems that he attributed to a steroid injection. Mr. Carradine also stated that he could not continue in the real estate business, although he had a license and had bought and sold real estate between 1975 and 1991. However, he was unable to pass the test for re-licensure after his injury.

Mr. Carradine was married to Josephine Baxter for approximately one year in 1974. He then married Jackie Wells in 1975, and they were married until 1996. They have three children together, Brandy, Jacob, and Caden. Mr. Carradine has been engaged to Susie Wells since 1998.

Mr. Carradine began smoking at approximately 20 years of age and continues to smoke approximately one pack a day. Although he has been arrested a few times for drinking while driving, he stated that his drinking has not caused significant problems, and currently he drinks approximately two beers a week. He denies the use of recreational drugs or addiction to prescription drugs.

HISTORY OF INJURY

According to medical records and reports by other physicians, Mr. Carradine (formerly Mr. Hoffman) was injured in an industrial accident on September 2, 1988. He was descending a ladder and missed a step, slipping off the ladder approximately 8 feet to the ground. He reported that he did not fall directly to the ground, but struck his knees on several of the rungs as he fell, and that when he hit the ground, his left foot slipped sideways, twisting at the knee. He was seen in an emergency care facility the same day, where he was diagnosed with a left knee sprain and he was prescribed rest. He continued to have difficulty with soreness, stiffness, and pain, and arthroscopic surgery was performed on December 28, 1988. Subsequent to the surgery, Mr. Carradine began a physical therapy regimen. He continued to have physical therapy until January 24, 1989, when he slipped and fell in a parking lot, sustaining injury to his shoulder while leaving physical therapy. As a result of the shoulder injury occurring while attending physical therapy for his knee, his shoulder injury was determined to be work-related. Dr. Newman then treated him for the shoulder injury. He was given an initial injection of cortisone, and he explained that he experienced tightening in his chest and a "flashing" sensation in his eyes, although this seemed to go away on its own, and he did not seek

medical help at that time. Mr. Carradine reported that had a second steroid injection approximately three months later. Following the second injection on February 26, 1990, Mr. Carradine reported an immediate sensation of his entire body being "on fire," and his face was flushed, along with respiratory distress. He reported that at the time of the injection he was at the University Hospital for pre-surgical lab testing, and after experiencing the symptoms, he went home. That night, he began experiencing wheezing, and the following day he noticed a rash over the entire upper torso, heart palpitations, a swollen right eyelid, and impaired vision in the right eye. Mr. Carradine was seen in the Emergency Department of the University Medical Center, where he was treated for excessive eye watering and facial and neck erythema. He was administered Benadryl and epinephrine for what was felt to be an angioneurotic edema. He was seen by Kathleen Digre, M.D., a neuro-ophthalmologist at the University Medical Center on May 7, 1990, for continuing complaints of impaired visual acuity in the right eye, diplopia, sensitivity to light with tearing in the right eye, and headaches in the right orbital and nasal area.

When discussing the history of his medical problems, Mr. Carradine noted that he was seen by a number of doctors and became very frustrated, as each one said there was nothing significantly wrong with him. On July 7, 1990, Mr. Carradine was at a meeting with his attorney, when he experienced spontaneous onset of right-sided frontal headache, a runny nose, lacrimation, and facial swelling. At that time, he reportedly became unresponsive with jerky movements of the upper and lower extremities on the right side. He reported a second episode, which occurred on his arrival at home in which the right upper and lower extremities were jerking. His eyes were reported to be rather blank, starting straight ahead, and the watering of his eyes and nose occurred. This jerking lasted for an estimated time of ten minutes. At this time, an ambulance was called, and Mr. Carradine was taken to St. Mark's Hospital Emergency Department. He was subsequently transferred to the University of Utah Medical Center, where admission examination reported eye swelling bilaterally and a right facial droop, as well as recurring episodes of brief impaired concentration and communication difficulty. He also was reported to experience several other symptoms, and during the initial hospital phase, the episodes were considered "suggestive of a possibility of partial seizures." During the hospitalization, Mr. Carradine noted diminished hearing in the right ear, and audiometric examination demonstrated bilateral hearing loss. Dr. Digre also completed several visual examinations, including visual field, visual acuity, and visual evoked response testing. Psychiatric evaluation at that time resulted in a diagnosis of significant depression secondary to a medical condition and associated psychosocial stressors. At the time of that hospitalization, Mr. Carradine's headaches were felt to be of migraine type and examinations during the hospitalization failed to confirm the presence of a definite right facial nerve paresis. At discharge, a seizure disorder was not diagnosed, and no antiepileptic medications were prescribed. Mr. Carradine continued to report symptoms consistent with the problems following his hospitalization in February 1990. A permanent impairment rating completed in November 6, 1990, by Nathaniel M. Nord, M.D. resulted in a 5% impairment of the whole person under the category of episodic neurologic disorders.

Review of medical records, as well as a recent independent medical examination by Edward B. Holmes, M.D. indicates that Mr. Carradine underwent a psychological evaluation by Susan

MacNamara, Ph.D. in March 1992. This evaluation was completed over four different testing sessions. There was no indication as to how he was referred for the evaluation. However, in addition to physical symptoms which had been previously described, he exhibited memory problems and decreased coordination. He also described experiencing confusion as well. He was evaluated with the Wechsler Memory Scale-Revised and the Verbal Memory Index score was 83, while the Visual Memory Index score was 81, with a General Memory Index of 81. At that time, he was also observed to have sensory and perceptual motor difficulties on the dominant right side. Neuropsychological screening tests indicated cognitive deficits in the mildly impaired range and on several of the tests, scores fell within the "moderate" to "severe" range. However, the actual protocols, as well as scores obtained on the tests were unavailable. Validity testing revealed that Mr. Carradine appeared to be cooperating fully with the evaluation, and Dr. MacNamara did not feel that he was attempting to over exaggerate problems. The results of the testing at that time indicated that Mr. Carradine was experiencing cognitive deficits involving memory and complex problem solving, and cognitive therapy was recommended. However, there is no indication that Mr. Carradine ever attended cognitive therapy sessions.

Mr. Carradine stated that he has been unable to work since 1991. He explained that following the closure of his own business, he tried to help his brother do framing on homes, but easily lost his equilibrium and was unable to climb up and down ladders. He also noted that if he looked up or down, he would become dizzy, and this is a problem which he still experiences.

Mr. Carradine indicated that he has been treated for high blood pressure since 1990, and review of current medications revealed that he is also prescribed Coreg for heart problems. He also noted that he continued to experience blackouts, as well as seizures, subsequent to his hospitalization in 1990, and he has fallen down and hit his head a number of times. He also incurred a traumatic brain injury in 1998. According to Mr. Carradine and Ms. Wells, he was playing darts at a club when he began experiencing a seizure. As he started to fall to the ground, he was hit on the side of the head by another patron of the club. Ms. Wells observed Mr. Carradine hit the back of his head, where it bounced on the cement. At the time of the accident, he experienced loss of consciousness for several minutes. When he gained consciousness, Ms. Wells took him home, where he laid in bed for approximately three days. He was very ill and would not eat or drink, complaining of dizziness. At that point, Ms. Wells took him to the hospital where he was admitted for 14 days. According to Ms. Wells and Mr. Carradine, neuroimaging studies detected bleeding in the brain, both between the hemispheres and behind the right ear. He experienced problems with speech and lost some speech fluency following the injury. He attended speech therapy a few times, and slowly regained his speech facilities, although he still exhibits some slight slurring of speech and occasional stuttering.

He began counseling for depression with Christy Kane, Ph.D. a psychologist, approximately three years ago. Mr. Carradine applied for and received Medicaid support approximately two years ago, partly to gain mental health benefits. In working with Mr. Carradine, Dr. Kane indicated continuing concerns regarding the neurologic and medical symptoms that he continued to experience. She recommended that he see a neurologist, but due to his enrollment in Medicaid, it was difficult to find a neurologist who would treat him. It was clear that Mr. Carradine experiences significant tremoring

bilaterally, both in the upper and lower extremities. Although he is able to walk, his legs bounce quite consistently when sitting, and his hands tremor both when resting and writing.

In describing his current symptoms, Mr. Carradine reports severe headaches approximately three times a week, dizziness, and difficulty with balance, and fatigue. He noted that he experiences extreme difficulty in sleeping and does not usually sleep through the night. Ms. Wells noted that Mr. Carradine appears to have seizures often during sleep, and he frequently wakes up covered in sweat. In asking Mr. Carradine to describe whether he is aware of a seizure coming on, he noted that at times, coughing spells seem to precipitate a seizure and at other times coughing does not precede the seizure. However, he did note that he experiences a feeling of shortness of breath, and his eyes and nose water, along with a feeling of becoming very hot. As the seizure continues, he begins to perspire rather profusely. He usually experiences a change in consciousness, and he stated that he is often fatigued and confused following these experiences.

Mr. Carradine explained that the most significant cognitive changes he is aware of include memory problems and concentration difficulties. He noted that he is unable to spell or do math in the same way he used to, and due to his tremors, he has significant difficulty writing. He also noted that when required to complete tasks that are taxing or difficult for him, his anxiety increases significantly, which also seems to trigger more seizures.

Emotionally, Mr. Carradine explained that he has struggled with depression on and off since his initial injury and as he has become less capable of doing things. He noted that he becomes "scared a lot," and feels lost at times, as though he does not know where he is. This confusion usually follows a seizure.

Mr. Carradine indicated that his appetite is quite decreased over the past several years, and he experiences nausea and vomiting. He also reports blurred vision and headaches, as well as ringing in the ears. He continues to experience blackouts and memory problems, as well as seizures. He reports decreased energy and poor sleep. He also noted changes in speech and language abilities, reading difficulties, and changes in math skills, as well as changes in thinking. He also reported changes in sense of smell and taste.

Mr. Carradine's psychologist suggested that he follow-up with a neurologist after he began working with her. He was examined by Dorothy Williams, M.D., a neurologist, who recommended EEG's approximately one year ago. According to Mr. Carradine, the EEG's were attempted on January 27th and February 2nd, 2006, by David Smith, M.D., another neurologist. However, the EEG results were inconclusive, as Dr. Smith reported that Mr. Carradine was coughing too much during the EEG's. However, a written summary from Dr. Smith did not include that information.

BEHAVIORAL OBSERVATIONS DURING TESTING

During the initial consultation, Mr. Carradine appeared very distressed and teary, and he was somewhat scattered in his ability to cohesively stay with a timeline of his medical history. When asked what he would like to find out from the evaluation, he stated "I just want to get back to my old

self."

Mr. Carradine presented for testing neatly dressed in jeans and a sleeveless denim shirt. His hair was pulled back in a ponytail. He was appropriately oriented to the testing setting and understood the purpose of the evaluation. Mr. Carradine was previously diagnosed with both vision and hearing problems. Although he had been prescribed glasses, he forgot them for the first session, but brought them for the remaining testing session. He was previously diagnosed with some hearing loss, but he did not wear hearing aids and did not appear to have difficulty understanding or hearing instructions. Mr. Carradine worked very slowly and deliberately in completing tasks, and as a result, testing took much longer than average. However, he did not require other special needs for testing, such as frequent breaks or altered presentation. Mr. Carradine's temperament was generally positive, and although he was visibly anxious and wanted to do well, he engaged in smiling and was primarily upbeat. A few times during testing, his eyes welled up with tears, and he became frustrated with his inability to do some types of tasks. He also exhibited seizure-like behaviors approximately four times over the two of the testing days, and this resulted in embarrassment and frustration on his part, although he continued with testing after short breaks. Social maturity level was age-appropriate. Mr. Carradine made no visible responses to praise and reinforcement, although he continued to work hard, and his motivation level seemed high. When faced with difficult tasks, he became visibly distraught but kept working and continued to try harder.

Mr. Carradine displayed good attention/concentration within the context of a one-on-one testing environment with no competing distractions. He asked clarifying questions and was observed to problem solve, often by talking to himself quietly. Mr. Carradine was not impulsive, and he did not appear to be distracted by outside stimuli, nor did he self-distract. Physical activity level was low, and Mr. Carradine was able to sit quietly in his seat throughout the testing sessions.

Speech/articulation was adequate, although some words were slightly slurred. No problems with rate, rhythm, or prosody of speech was noted. Mr. Carradine's speech pattern was somewhat slower than "average," and he appeared to stop and think several times when trying to communicate information. Self-confidence level appeared to be low, although Mr. Carradine readily began tasks. Effort and motivation were high, and were sustained throughout the testing session. Mr. Carradine persisted with tasks without difficulty, and he was cooperative and motivated. Rapport was established without difficulty, and results of current testing appear to be a good estimate of Mr. Carradine's intellectual and cognitive abilities. Mr. Carradine was observed to experience seizures during the course of the testing. He appeared to be more vulnerable to seizure activity when he was cognitively stressed. At times, the seizures began after a coughing spell, although there were times when they began spontaneously. Mr. Carradine was noted to begin seizure activity by staring blankly ahead, after which time he engaged in lip smacking behavior and sometimes clenching of the fists. He was also observed to become flushed and sweat appeared on his forehead. His eyes and nose watered and ran as well. Seizure activity generally lasted between one to three minutes, after which time he appeared to be somewhat dazed and could not remember what had previously been spoken. When asked about the experience of seizures, Mr. Carradine noted that he begins to become very hot. He stated that he feels pressure in his eyes and ears and loses focus. Following a seizure, he

stated that he loses track of where he is and feels confused. He also feels "drained" after a seizure episode and sometimes has to lie down.

TEST RESULTS AND INTERPRETATION

Overall intellectual ability was assessed through the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). Mr. Carradine obtained a Full Scale I.Q. score of 77 (6th percentile), with a Verbal I.Q. score of 84 (14th percentile), and a Performance I.Q. score of 73 (4th percentile). The Verbal Comprehension Index score was 82 (12th percentile) and the Perceptual Organization Index score was 76 (5th percentile). Mr. Carradine's Working Memory Index score was 84 (14th percentile). Mr. Carradine's Full Scale I.Q. score of 77 suggests intellectual functioning within the "borderline impaired" range. Records of psychological testing that was completed in 1992 did not include I.Q. scores, and a full report of testing was not available. However, the results of the WAIS-III indicate that Mr. Carradine's Verbal Comprehension abilities fall within the "low average" range, while perceptual organization and nonverbal reasoning skills fall in the "borderline impaired" range. On the Verbal Comprehension tasks, examination of subtest scaled scores that contributed to the Verbal I.Q. score indicated that Mr. Carradine's highest subtest score was a Verbal Comprehension task, where he scored at the 50th percentile. On a task of verbal concept formation and verbal reasoning, Mr. Carradine scored at the 16th percentile ("low average" range), and general fund of language-based information fell in the "borderline impaired" range (9th percentile). Expressive vocabulary abilities, as measured by the WAIS-III Vocabulary subtest fell at the 16th percentile, while receptive vocabulary, as measured by the Peabody Picture Vocabulary Test-Third Edition (PPVT-III) fell at the 30th percentile. The difference in scores indicates that Mr. Carradine understands more than he is able to easily express.

Mr. Carradine's performance on the perceptual organization and visual-spatial tasks reflected generally consistent abilities, with scaled scores ranging from the 5th to the 16th percentile. His Perceptual Organization score on the WAIS-III of 76, fell at the 5th percentile. Mr. Carradine exhibited the most difficulty with speed of operations, and on the Block Design subtest, he completed two extra items correctly, but over the time limit. Therefore, he could not receive credit for these items. He often talked quietly to himself while working, and encouraging himself with phrases such as "okay, okay." His scaled score on the Block Design subtest fell at the 5th percentile. On a task of nonverbal reasoning and concept formation, Mr. Carradine scored at the 9th percentile ("borderline impaired" range). The most striking observation of his performance on the WAIS-III was general slowing of processing speed and the inability to work quickly under timed conditions. He scored at the 2nd percentile on a task which relied on graphomotor speed and accuracy, and difficulty with speed of written language was also observed on other writing tasks. Mr. Carradine completed the Rey-Osterrieth Complex Figure Drawing as a measure of visuospatial motor function, as well as organization and memory. He was careful in completing the drawing, although he exhibited tremoring while drawing, and the task appeared to be stressful for him. He scored below the 1st percentile on both the copy and the immediate and delayed recall tasks.

The Wide Range Achievement Test-Revision 3 (WRAT3) was administered as an academic screening measure. Mr. Carradine obtained a Reading (i.e., single word recognition) standard score of 75 (5th percentile), a Spelling standard score of 57 (.5th percentile), and an Arithmetic standard score of 80 (9th percentile). Although the WRAT3 does not provide detailed information regarding strengths and weaknesses within each of these areas, the scores suggest that Mr. Carradine is at approximately the 6th grade level for word recognition and decoding skills, the 2nd grade level for spelling skills, and the 6th grade level for arithmetic skills. These scores indicate that he is significantly low in terms of academic achievement and it is likely that he has experienced a decrease in academic achievement abilities over time. However, high school transcripts were unavailable. It should be noted that Mr. Carradine has a history of a successful business which he ran for approximately 13 years, as well as a reported real estate license with purchases and sales in real estate. This successful vocational history would suggest that he was performing at a much higher level prior to his injury in 1990, and had significantly higher skills than he does presently.

Mr. Carradine displayed no obvious difficulty for visual or auditory acuity within the context of the testing session. He was able to consistently identify his own left and right and that of the testing technician facing him. He demonstrated right dominance for upper extremity and lower extremity, and left ocular dominance. Mr. Carradine exhibited some minor balance problems, and he tended to use the wall or desk as a support in order to maintain balance when standing up or moving. However, he was able to walk unassisted and did not use a cane. A measure of grip strength reflected bilateral weakness, with greater weakness exhibited with the dominant right hand than the non-dominant left hand. His performance on a task of simple fine motor speed fell below the "age-expected" range (bilaterally), although he was incrementally faster with the dominant right hand than the left. On a more complex task of motor speed and fine motor dexterity, Mr. Carradine exhibited significant difficulty with both fine motor speed, as well as fine motor manipulation. He was very deliberate and slow, and he exhibited much more difficulty with fine motor manipulation when using the left hand, as opposed to the right. This task appeared to be very stressful for him, and he experienced a seizure episode toward the end of the task. The results of the lateralization tasks indicated a relative weakness with the right hand, as well as bilateral slowing of speed for simple motor tasks, as well as more complex tasks that require both speed and fine motor manipulation.

Evaluation of memory and learning capacity reflected impaired learning and memory skills, and the General Memory Index score on the Wide Range Assessment of Memory and Learning-Second Edition (WRAML2) was 59 (0.3rd percentile). The WRAML2 assesses memory and learning in two general areas, verbal memory and visual memory. In addition, there are subtests that require more focused attention/concentration for immediate rote memory tasks. Mr. Carradine's Verbal Memory Index score on the WRAML2 was 82 (12th percentile), a score within the "low average" range. On the Story Memory Task, one of the Verbal Memory subtests, he performed in the "borderline impaired" range (9th percentile). This task required him to listen to two stories presented orally and repeat each story back with as many details as possible. Mr. Carradine exhibited difficulty remembering a large number of the story details, recalling approximately one-third of the details. He also lost a significant amount of information after a short delay, indicating that he quickly reached a ceiling in the amount of information he was able to recall, and struggled to access that information

over time. Mr. Carradine's ability to remember sentences verbatim (i.e., immediate auditory recall) fell at the 16th percentile, and his ability to remember number/letter strings verbatim fell at the 2nd percentile, indicating significant difficulty with rote auditory memory.

For sequential trial learning of orally presented words, Mr. Carradine performed at the 25th percentile (low end of "average" range). This test required him to learn a long list of unrelated words over four different trials. Mr. Carradine exhibited a shallow but positive learning curve, with recall increasing slowly over four consecutive trials. However, he again lost a significant amount of information after a short delay, with the number of items recalled virtually the same as his initial learning trial.

Mr. Carradine exhibited significant difficulty on tasks that required visual memory skills, and his Visual Memory Index on the WRAML2 was 60 (0.4th percentile). He performed in the "impaired" range (2nd percentile) on a task which required recall and reproduction of increasingly complex designs. He also scored in the "impaired" range (1st percentile) on a task in which he had to locate and recall missing or changed details on detailed drawings. On a task for immediate attention/concentration for visual sequential information, Mr. Carradine scored below the 1st percentile, again demonstrating very significant difficulty on tasks of visual attention, visual sequencing, and speed of visual processing.

Mr. Carradine's performance on tasks which included working memory abilities for verbally presented information fell within the "low average" range, as measured by the Working Memory Index score on the WAIS-III (Working Memory Index 84, 14th percentile). Working memory is the type of memory ability where information must be cognitively held in mind while mental manipulation is performed on that information. An example of a working memory task is developing a solution to an oral math problem without the aid of pencil and paper. Mr. Carradine performed at the 9th percentile ("borderline impaired" range) on a task which required solving orally presented math problems. He performed at the low end of the "average" range (25th percentile) on tasks that required him to organize random numbers and letters into specific groupings, as well as on a task that required him to recall increasingly longer strings of numbers and repeat number strings both forwards and backwards. Mr. Carradine's Working Memory score on the WRAML2 also fell within the "low average" range (13th percentile), indicating consistent performance on working memory tasks. His performance on tasks of working memory suggest that although he also struggles with working memory, his ability to perform a mental task while holding information in mind is more intact than his delayed recall for newly learned information.

Mr. Carradine's overall performance on learning and memory tasks indicates that he demonstrates generally "low average" memory and learning abilities for orally presented information and impaired memory and learning abilities for visually presented information. However, on both verbal and visual memory and learning tasks, Mr. Carradine exhibits significant difficulty transferring information from short-term to long-term memory, and in turn struggles with the ability to retrieve that information at a later time. Mr. Carradine's performance on the memory and learning tasks is consistent with the type of profile seen with seizure disorders, where frequent seizures impair the

ability to transfer information into long-term storage, as unusual electrical activity in the brain interrupts the ability to both transfer and retrieve information from long-term memory.

Mr. Carradine also completed the Test of Memory and Malinger (TOMM) to assess the level of effort involved in memory tasks, as well as level of motivation during testing. His performance on that instrument suggested adequate levels of motivation, and no attempts to overexaggerate symptoms.

For higher order intellectual ability (reasoning, judgment, problem-solving), Mr. Carradine exhibited significant difficulty on a task of flexible problem solving for visually presented stimuli. He struggled to develop problem-solving strategies when instructions were not explicit, and he made a large number of errors, struggling to develop consistent problem solving strategies. He also made a number of perseverative errors (suggesting rigid responding), indicating that it was difficult to change strategies, even though the present one was not working for him. He exhibited difficulty maintaining a problem solving set over time, changing strategies when there was no external information that would prompt him to do so. Mr. Carradine exhibited challenges initially developing a problem solving set, and he required many more trials than "average" in order to find an initial solution to the flexible thinking task. On another flexible thinking task that measures attention, sequencing, mental flexibility and visual search and motor function, Mr. Carradine exhibited problems shifting from one concept to the next under timed conditions. He tended to move slowly between concepts and was unable to easily shift between alternative perceptual sets in order to conform to changing demands without sacrificing speed. Mr. Carradine's performance on flexible thinking tasks indicated that he struggled excessively when tasks required higher levels of reasoning and problem-solving, as well as a demand to shift perceptual sets, reflecting impaired ability for flexible thinking.

Emotions, behavior, and personality were assessed by history, direct observations during the evaluation process, and behavior checklists. By self-report, Mr. Carradine endorsed severe levels of anxiety and depression on individually administered self-report measures. On the Beck Anxiety Inventory, he identified a significant number of somatic complaints (physical symptoms), including feeling hot, unsteady, shaky, and sweating. It should be noted that when asked to describe any symptoms or signs that occurred previous to a seizure, he indicated that he feels increased pressure in the head and behind the eyes, as well as excessive sweating, and although these symptoms are also related to anxiety, they may be more accurately identified as precursors to seizure activity. On the Beck Depression Inventory, Mr. Carradine endorsed many symptoms as well, particularly noting lack of pleasure from things he previously enjoyed, difficulty making decisions, problems with restlessness and agitation, and high levels of irritability and difficulty concentrating. Mr. Carradine's anxiety and depression are likely a combination of neurologic changes, as well as depression and feelings of frustration regarding his inability to do things that were previously easier for him, along with depression regarding the deterioration of both mental and physical capacity. Mr. Carradine also reported high levels of fatigue and continuing difficulty with sleep regulation. He noted that he sleeps very poorly, awakening frequently during the night. His fiancé also indicated that Mr.

Carradine also experiences frequent night sweats, as well as apparent seizures, often with shaking, awakening her several times during the night.

SUMMARY AND RECOMMENDATIONS

Mr. Carradine is a 52-year-old, right-handed, Caucasian male who has a complicated medical history which began in 1989. He initially sustained a knee injury while on the job which required subsequent surgeries and a long period of physical therapy. Subsequent to one of his physical therapy sessions, Mr. Carradine slipped on some ice in the parking lot, injuring his shoulder. The shoulder injury led to a prescription of steroidal medication for inflammation and two injections of anti-inflammatory steroid substances. Following a second injection, Mr. Carradine experienced a severe negative reaction, and the injection appeared to result in neurologic and physical changes, including hearing loss, numbness and tingling on the right side of the body, and vision problems in the right eye. Mr. Carradine also began experiencing seizure-like activity shortly after the steroid injection. Although the severity and frequency of the seizures appears to have worsened over the years, the type of seizure activity, as well as the symptoms and characteristics surrounding the seizures has not changed substantially in the last approximately 15 or 16 years. Mr. Carradine has sought medical help several times for the seizures, as well as other problems which appear to have occurred after the injection of steroids. However, over the years, he has received very little support, and he has been told by several professionals in the medical area that there is virtually no likelihood that his symptoms are a result of the initial problems he incurred following the steroid injections. Various independent medical examinations have characterized Mr. Carradine as having "somatoform disorders" or indicate that Mr. Carradine has functionally embellished symptoms. While no medical historical information indicates that the physical symptoms such as weakness, hearing loss, or visual problems were present previous to the injury, it does appear that Mr. Carradine exhibited physiological problems of this type subsequent to the injection of steroids in 1989.

As early as July of 1990, Mr. Carradine was examined at the University of Utah following what appeared to be seizures with recurrent episodes of brief impaired concentration and physical changes primarily on the right side of the body. As quoted in an examination of records by Nathaniel M. Nord, M.D., during the initial hospital phase, "episodes suggestive of a possibility of partial seizures" were witnessed. The report also noted that two electroencephalograms were obtained which were normal. It should be noted that normal EEG's cannot totally rule out seizure activity, and studies have reported that an estimated up to 30% of individuals who experience seizures will have a negative EEG, particularly if a seizure is not taking place at the time of the EEG.

In an Independent Medical Examination (IME) completed by Edward B. Holmes, M.D. in April of 2006, Dr. Holmes included information regarding a psychiatric evaluation that was completed on June 27, 1990. At this time, an MMPI (a personality inventory) was completed with reported "psychosomatic" type scores. Indeed, Mr. Carradine apparently had elevated scores in the area of HS, HY, and D scales. It is important to note that high elevations in these areas are known as the "1, 2, 3" triad. While this profile can be seen in individuals with psychosomatic complaints, research has shown that this profile of elevations is extremely commonly in individuals who have a history of chronic physical ailments, such as chronic migraines or traumatic brain injury in which a number of

physical and medical complaints are valid. For these reasons, the MMPI does not necessarily give a valid picture for individuals with chronic medical or pain conditions, and it was not normed on individuals from such categories. Instead, it was normed on individuals with psychiatric conditions, and therefore must be interpreted extremely cautiously when used to analyze personality profiles of individuals with a concurrent medical condition.

In the IME report completed by Dr. Holmes, there is also a notation that a psychological evaluation was completed on March 3, 1992, by Susan MacNamara, Ph.D. at the request of Madison, Thomas, MD, to assist with an Industrial Commission Independent Medical Examination. A copy of the original report was reviewed. Dr. MacNamara administered the Wechsler Memory Scale-Revised, and Mr. Carradine obtained a Verbal Memory Index score of 83, a Visual Memory Index of 81, and a General Memory Index of 81. She did not administer I.Q. testing at that time. On several neuropsychological tests, she reported that the tests were "sensitive indicators of cognitive deficits" and that "he had cognitive deficits evident in the mildly impaired range and on several of the tests, within the moderate to severe range." She noted that certain tests "clearly and consistently indicate sensory and motoric deficits in his dominant, right side" and that "such deficits would be difficult to intentionally demonstrate, especially by a naïve subject". Dr. MacNamara concluded that Mr. Carradine was experiencing cognitive deficits involving memory and complex problem solving, and cognitive therapy was recommended.

In the current evaluation, many of Mr. Carradine's scores on the testing are consistent with testing completed approximately 14 years ago. His Verbal Memory score on the current testing was 82, reflecting consistent verbal memory abilities. However, Mr. Carradine's visual memory and visual-spatial organization abilities have deteriorated substantially since that time, with scores falling below the 1st percentile. He exhibited extreme difficulty with both immediate and delayed recall tasks. Due to the lack of full access to previous testing records, as well as some differences in instruments administered, direct comparisons cannot be made. However, Mr. Carradine's greatest deficits continue to be seen in the area of memory. Mr. Carradine's overall performance on learning and memory tasks indicates that he demonstrates generally "low average" memory and learning abilities for orally presented information and impaired memory and learning abilities for visually presented information. However, on both verbal and visual memory and learning tasks, Mr. Carradine exhibits significant difficulty transferring information from short-term to long-term memory, and in turn struggles with the ability to retrieve that information at a later time. Mr. Carradine's performance on the memory and learning tasks is consistent with the type of profile seen with seizure disorders, where frequent seizures impair the ability to transfer information into long-term storage, as electrical activity in the brain interrupts the ability to both transfer and retrieve information from long-term memory.

Mr. Carradine also completed the Test of Memory and Malinger (TOMM) to assess the level of effort involved in memory tasks, as well as level of motivation during testing. His performance on that instrument suggested adequate levels of motivation, and no attempts to over exaggerate symptoms.

There are two things that should be noted in the current testing as it relates to Mr. Carradine's current condition and intervening circumstances between previous testing and current testing. First, it appears that Mr. Carradine has experienced "seizure-like activity" for over 15 years with virtually no pharmacological intervention for the condition. The presentation of seizure activity, along with reports given by both Mr. Carradine and his fiancé are suggestive of partial complex seizures that at times move into generalized seizures. A review of symptomatology surrounding complex partial seizures indicates that these seizures arise from single brain region and impair consciousness, resulting in decreased responsiveness and awareness of self and surroundings. During the beginning of a complex partial seizure, some patients may make simple verbal responses or follow commands, although their awareness is impaired. Although complex partial seizures typically arise from the temporal lobe, they may arise from any cortical region within the brain. One of the common observations by those who are observing this type of seizures are what is called "automatisms," which are quasi-purposeful motor or verbal behaviors that accompany the seizure. This behavior is called quasi-purposeful because it is repeated inappropriately or is inappropriate for the situation. Motor automatisms are classified as simple and complex, and simple motor automatisms include oral automatisms (e.g., lip smacking, chewing, and swallowing). Manual automatisms can include behaviors such as "picking, fumbling, or patting." Information regarding the course of complex partial seizures notes that they often begin with a "motionless stare," followed by simple oral or motor automatisms. It is also important to note that although complex partial seizures generally last between 30 seconds to 2 minutes, longer seizures may occur, particularly when seizures become generalized convulsions. Complex partial status epilepticus can also occur with prolonged episodes of waxing and waning of consciousness. There are accounts in which medical professionals have observed Mr. Carradine while seizure activity is taking place, and it has been noted that Mr. Carradine engaged in behaviors such as lip smacking and pulling at his shirt. During the course of testing, Mr. Carradine exhibited a similar pattern of activity, including a motionless stare, followed by the oral automatism of lip smacking and sometimes occurring with a picking at his clothing. Mr. Carradine was not responsive during the majority of the activity, and experienced some confusion and loss of awareness of his surroundings for a short time following the end of a cycle. Mr. Carradine also exhibits significant coughing spells and running eyes and nose prior to many of the seizures. Although the coughing itself would not likely trigger seizures, it is possible that reduction in blood pressure as a result of coughing could trigger a seizure. The trembling and shaking can also become worse during a partial seizure episode.

Additionally, it is important to be aware that Mr. Carradine also experienced a traumatic brain injury in 1998. Apparently, the TBI was moderate in severity, and MRI's completed in 2004 showed signs of gliosis in the frontal and temporal lobe areas as an apparent result of the traumatic brain injury. In regard to Mr. Carradine's, violent tremoring, David J. Smith, M.D., a neurologist who examined Mr. Carradine in February 2006, stated, "The shaking does not look like essential tremor or like any seizure." In a review of medical records from 1990 to 1998, no narratives were found that described significant tremoring as a symptom. Although Mr. Carradine may have experienced very mild hand tremors prior to 1998, it is likely that current tremors are a result of some neurologic damage that was sustained following the traumatic brain injury in 1998.

Research indicates that the most common neurocognitive consequences of seizure disorders include problems with memory, attention/concentration, executive functioning (i.e., reasoning, flexible thinking, problem solving) and visual/spatial weakness. Mr. Carradine's neurocognitive profile is consistent with a seizure disorder. The results of the current evaluation indicate that Mr. Carradine exhibits significant neurocognitive weaknesses, including impaired ability to use nonverbal skills and visual-spatial abilities to reason and problem solve, difficulty for long-term memory, both for orally presented information, as well as visually presented information, and significant difficulty for executive functioning abilities such as flexible thinking and problem solving, multitasking, and tasks that require extended attention and concentration abilities. He also exhibits significant slowing of cognitive processing speed, and as a result, task completion is extremely slow. In addition, Mr. Carradine exhibits neurobehavioral challenges, including high levels of depression and anxiety, along with physical sequelae, including fatigue and extreme difficulty with the sleep/wake cycle. Mr. Carradine's seizure disorder has high probability of impacting new learning and memory skills, and Mr. Carradine clearly struggles to both move information into long-term storage and access the information later on.

Although there has been discussion by various physicians in the past about the possibility of trying Mr. Carradine on anti-epileptic medication, due to lack of verification through EEG's, it appears that no long-term medication trials have been tried. As a result, it is difficult to determine what his physical response to such medication would be. Perhaps working with another neurologist who would be willing to try medication with Mr. Carradine could result in improvement in the symptoms that he experiences, as well as decrease in the seizure-like episodes. Clearly, if Mr. Carradine has been experiencing seizures for the last 16 years, the seizure threshold would be lower, and the number and intensity of the seizure activity would have likely increased over the years without pharmacological intervention.

Mrs. Carradine's case is clearly a complicated one, and it presents challenges as to whether the medical problems he experienced as a result of steroid injections he received in 1989 could result in the variety of problems that he has struggled with since that time. Mr. Carradine was treated for specific, measurable problems, with no apparent history of previous, similar problems prior to the injections. Although it is extremely rare, reactions to such substances do exist. Another important factor is the type and pattern of problems that he complained off. Since 1990, there are records of seizure-like behavior with the same type of symptom profile, and the same types of complaints of memory problems, sleep difficulties, and executive functioning problems. Neuropsychological testing completed in 1992 reflects the same types of problems as recorded in the current evaluation, and both evaluations reflect the type of profile commonly associated with seizure disorder. Although Mr. Carradine has demonstrated increased deterioration, it is important to note that it has been nearly fifteen years since his initial injury and that treatment has been virtually non-existent. Without such treatment, seizure activity is highly likely to get worse over time. He has also experienced a traumatic brain injury that has resulted in increased physical and cognitive issues on top of the original trauma. However, it seems that his initial complaints have not changed dramatically over all of these years.

Although Mr. Carradine expressed his strongest desire to be "getting back to my old self," even with appropriate treatment for seizures, as well as cognitive therapy to aid him in finding accommodations for memory difficulties, Mr. Carradine's neuropsychological profile does not support his ability to return to work even part-time, and indeed suggests that he has experienced a number of medical, neurocognitive, and neurobehavioral problems that support a conclusion of long-term disability, and return to work is not a conclusion in the foreseeable future.

The results of the current evaluation, along with observations during testing, medical history, and other historical information indicates that Mr. Carradine's profile on current testing is consistent with the following diagnostic profile:

909.0	Toxic effect of drug, medicinal or biological substance
345.4	Partial seizures with impairment of consciousness
348.0	Encephalopathy, NOS
780.54	Disturbance of sleep/wake cycle
293.83	Mood disorder due to chronic medical problems
293.84	Anxiety disorder due to chronic medical problems

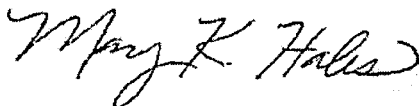
The following recommendations are made in Mr. Carradine's behalf:

1. In addition to the seizure-like activity, Mr. Carradine continues to experience difficulties with fatigue and normal regulation of sleep. It is recommended that he continue to work with his primary care physician to find medications which may assist with regulation of sleep, and he would also likely benefit from a sleep study to determine if there are any other conditions other than the seizure activity that appears to occur at night, which are interrupting sleep or making sleep much less restful.
2. It is recommended that Mr. Carradine receive an evaluation by a cognitive rehabilitation therapist to determine whether he can be assisted in developing better functional skills due to significant memory difficulties. If the evaluation results suggest cognitive rehabilitation therapy would be beneficial, it is recommended that he continue in such therapy for approximately six months. Cognitive rehabilitation can be helpful in developing new strategies for memory problems, problems with attention/concentration, and help in better organizing his environment.
3. It is recommended that Mr. Carradine have the opportunity to consult with a psychiatrist regarding the best medications for reduction of symptoms of depression and anxiety. These problems clearly interfere with his quality of life and ability to function at the highest levels, and finding the right medication, particularly if he is also prescribed medications for seizures, will be important.
4. It is recommended that Mr. Carradine continue to work with a psychologist or therapist in order to develop more effective strategies for managing his environment, dealing with mood

regulation problems, and developing appropriate coping strategies. Cognitive/behavioral therapy can be very helpful for these types of problems.

5. It is recommended that Mr. Carradine be considered for permanent disability through the office of Social Security. It is clear that regardless of the genesis of the medical and neurocognitive, as well as neurobehavioral problems, that he has exhibited over the past several years the probability of recovery to the point of being able to work is extremely low, and Mr. Carradine will very likely not be able to return to work at any time in the foreseeable future.

If I can provide any additional information or more specific recommendations, please do not hesitate to contact me.



Mary K. Hales, Ph.D.
Clinical Neuropsychologist

Patient: CARRADINE, Denny Date of Testing: 8/29/06 Neuropsychometrician: Mary K. Hales, Ph.D.

<u>Verbal Subtests*</u>		<u>Performance Subtests*</u>	
Vocabulary	7	Picture Completion	7
Similarities	7	Digit Symbol-Coding	4
Arithmetic	6	Block Design	5
Digit Span	8	Matrix Reasoning	6
Information	6	Picture Arrangement	6
Comprehension	10	Symbol Search	-
Letter/Number Sequencing	8	Object Assembly	-

Completion	7
Symbol-Coding	4
Design	5
Reasoning	6
Arrangement	6
Search	-
Assembly	-

Core Subtest*			
Story Memory	6	Verbal Memory:	82 (12 th percentile)
Design Memory	4	Visual Memory:	60 (0.4 th percentile)
Verbal Learning	8	Attention/Concentration:	57 (0.2 nd percentile)
Picture Memory	3	General Memory:	59 (0.3 rd percentile)
Finger Windows	1	Working Memory:	83 (13 th percentile)
Number/Letter	4	Verbal Recognition:	65 (1 st percentile)
Optional Subtests			
Verbal Working Memory	8		
Symbolic Working Memory	6		
Sentence Memory	7		
Story Memory Recall	7		
Verbal Learning Recall	6		
Story Recognition	3		
Verbal Learning Recognition	5		

	<u>Raw</u> <u>Score</u>	<u>Standard</u> <u>Score</u>	<u>Percentile</u>	<u>Grade</u> <u>Equivalent</u>
Reading	37	75	5 th	6 th
Spelling	23	57	5 th	2 nd
Arithmetic	34	80	9 th	6 th

PEABODY PICTURE VOCABULARY TEST-THIRD EDITION (FORM III)

Raw Score: 180 Percentile: 30th
Standard Score: 92 Age Equivalent: 22+

WISCONSIN CARD SORTING TEST

Trials Administered	128	
Total Correct	74	
Total Percent Error	42%	(standard score 84; 14 th percentile)
Total Percent Perseverative Error	24%	(standard score 84; 14 th percentile)
Percent Conceptual Level Responses	41%	(standard score 81; 10 th percentile)
Categories Completed	3	(6 th to 10 th percentile)
Trials to Complete Category I	41	(2 nd to 5 th percentile)
Failure to Maintain Set	2	(>16 th percentile)
Learning to Learn	-8.80	(2 nd to 5 th percentile)

HALSTEAD-REITAN NEUROPSYCHOLOGICAL TEST BATTERY

Lateral Dominance Examination:

Upper Extremity: Right Lower Extremity: Right Ocular: Left

Name Writing:

Dominant hand (R): 16 seconds (mean = 9.0; s.d. = 1.9; z-score = -1.05)
Non-dominant hand (L): 40 seconds (mean = 20.7; s.d. = 6.3; z-score = -1.37)

Strength of Grip:

Dominant (R): 30.0 kg (age mean = 29.8; s.d. = 5.8; z-score = 0.50)
Non-dominant (L): 41.33 kg (age mean = 24.9; s.d. = 6.7; z-score = 1.54)

Finger Tapping Test:

Dominant (R): 45.4 (mean = 43.4; s.d. = 7.09; z-score = 0.25)
Non-dominant (L): 41.8 (mean = 38.2; s.d. = 6.5; z-score = 0.40)

Trail Making Test:

Part A: 76 seconds, 0 errors (mean = 35.1; s.d. = 10.1; z-score = -3.86)
Part B: 193 seconds, 0 errors (seriously impaired range >106; mean = 77.7; s.d. = 23.8; z-score = -5.05)

GROOVED PEGBOARD TEST

Dominant (R): 105 seconds, 0 errors
Non-dominant (L): 115 seconds, 0 errors

REV-OSTERREITH COMPLEX FIGURE DRAWING

	<u>Copy</u>	<u>Immediate Recall</u>	<u>Delayed Recall</u>
Raw Score	20.5	7.5	3.5
Range	0.0 -29.5	-	-
T-Score	-	23	<20
Percentile	<1 st	<1 st	<1 st
Time	>16 th	-	-

TEST OF MEMORY MALINGERING (TOMM)

Neuropsychological Evaluation
Page 20

Denny Michael Carradine (Hoffman)

Trial I: 30/50
Trial II: 48/50
No evidence of malingering

BECK DEPRESSION INVENTORY-II (BDI-II)

Raw Score: 38 (severe range = 29-63)

BECK ANXIETY INVENTORY

Raw Score: 45 (severe range = 26-63)

*mean = 10; s.d. = 3

TESCH
LAW OFFICES
A Professional Law Corporation

PARK CITY
314 Main Street, Suite 200
P.O. Box 3390
Park City, Utah 84060-3390
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Facsimile: (435) 649-2561

SALT LAKE CITY
Telephone: (801) 363-5111

HEBER CITY
2 South Main Street, Suite 2-D
Heber City, Utah 84032
Telephone: (435) 654-1550
Facsimile: (435) 654-1554

November 15, 2006

Honorable Deidre Marlowe
Administrative Law Judge
Labor Commission of Utah
160 East 300 South, 3rd Floor
P.O. Box 146600
Salt Lake City, Utah 84114-6600

Re: Denny Carradine

Honorable Deidre Marlowe:

Please find enclosed a copy of the testing results for Denny Carradine from Dr.
Mary Hales' office.

Sincerely,
TESCH LAW OFFICES, P.C.



Brin Butler
Legal Assistant for Shawn W. Potter

Enclosure

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2 South Main Street, Suite 2-D
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Facsimile: (435) 654-1554

November 15, 2006

Dr. Allan Goldman
Neurology & Psychiatry
5810 South 300 East # 300
Salt Lake City, Utah 84107

Re: Denny Carradine

Dear Dr. Goldman:

Please find enclosed a copy of the testing results for Denny Carradine from Dr. Mary Hales' office. Should you wish to discuss, please phone Mr. Potter in our Park City office.

Sincerely,
TESCH LAW OFFICES, P.C.



Brin Butler
Legal Assistant for Shawn W. Potter

Enclosure

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Facsimile: (435) 654-1554

November 15, 2006


Hans M. Scheffler
392 East 6400 South
Salt Lake City, Utah 84107

Re: Denny Carradine

Dear Hans:

Please find enclosed a copy of the testing results for Denny Carradine from Dr.
Mary Hales' office.

Sincerely,
TESCH LAW OFFICES, P.C.



Brin Butler
Legal Assistant for Shawn W. Potter

Enclosure

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Facsimile: (435) 654-1554

November 15, 2006

Elliot Lawrence
Employers' Reinsurance Fund
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84114

Re: Denny Carradine

Dear Elliott:

Please find enclosed a copy of the testing results for Denny Carradine from Dr. Mary Hales' office.

Sincerely,
TESCH LAW OFFICES, P.C.



Brin Butler
Legal Assistant for Shawn W. Potter

Enclosure

Attachment B

UTAH LABOR COMMISSION
ADJUDICATION DIVISION

DENNY CARRADINE,
Petitioner,

vs.

TRUE FLO MECHANICAL SYSTEMS,
INC.; WORKERS COMPENSATION
FUND, EMPLOYERS REINSURANCE
FUND,
Respondents.

FINDINGS OF FACT
AND INTERIM ORDER

Case No. 05-0292

Judge: DEIDRE MARLOWE

Hearing: April 25, 2006

Appearances:

Shawn W. Potter for the Petitioner

Hans Scheffler for the Workers' Compensation Fund

Elliott Lawrence for the Employer's Reinsurance Fund

Denny Carradine¹ filed an application for hearing on March 25, 2005 requesting permanent total compensation. The Petitioner claimed that on September 2, 1988 he was injured after he fell down a ladder and injured his knees, right shoulder, neck, and nervous systems, including optic nerve damage and hearing loss.

True Flo Mechanical Systems Inc. and the Workers Compensation Fund filed an Answer on May 3, 2005. The Fund asserts it paid compensation to the Petitioner according to an order issued by Judge Elicerio in 1992, and that it continues to pay medical expenses also awarded in that order. It asserts that the Petitioner is not permanently and totally disabled.

The Employers Reinsurance Fund filed an answer on April 8, 2005 wholly denying the claim.

SUMMARY OF PRIOR ADJUCATION

The Findings of Fact, Conclusions of Law and Order issued by Judge Elicerio on June 5, 1992 is attached as Exhibit A.

¹ The Petitioner was formerly known as Denny Hoffman.

FINDINGS OF FACT AND INTERIM ORDER

Denny Carradine, Case No. 05-0292

Page 2

To sum, the Petitioner was injured on September 2, 1988 while descending a ladder. He missed a step, slipping and overcompensating. This resulted in a severe twist to his left knee.

The Petitioner was treated conservatively for a year and then a diagnostic arthroscopy was performed on December 20, 1988; a torn medical meniscus was repaired a week later. On January 24, 1989 the Petitioner slipped and fell on some ice while on his way to physical therapy for his knee. In this fall he injured and was treated for his midback, coccyx, left foot, right wrist, right shoulder, both knees, contusions, and headaches. The right shoulder injury was considered to be a strain type injury and the Petitioner was sent to physical therapy for both the shoulder and the original left knee injury.

Conservative care was continued under Dr. Alan T. Newman. However, on October 3, 1989 the Petitioner reinjured his knee while getting out of a chair. On March 2, 1990 the Petitioner had another surgery on his knee. After that the knee appeared to be resolving but the Petitioner continued to have difficulty with his shoulder. In February 1990 the Petitioner had a steroid injection into his shoulder which he alleged caused a severe allergic reaction and led to seizures, hospitalization, and ongoing neurological issues.

The case was sent to a medical panel. The neurological issues considered by the panel were: hearing, vision (including double vision, problems when exposed to bright light, peripheral hallucinations and right eye focusing difficulties) right-sided headaches, episodes of difficulty breathing with coughing and chest pain, and cognitive problems (difficulty spelling, writing, remembering, and performing coordinated activities). The panel gave the following impairment ratings: visual (partial optic atrophy) 14% whole person; psychiatric 10% whole person; right shoulder 5% whole person; left knee 4% whole person; right knee 2% whole person; and right facial nerve (residual paresis) 2% whole person.

Judge Elicerio concluded that all of these conditions were legally and medically causally connected to the September 2, 1988 industrial injury and awarded benefits. Review was not requested and her order became final on July 5, 1992. **This means that it has already been concluded legally and medically that the steroid injection caused the Petitioner's neurological conditions as encountered by the medical panel in 1992.** The sole question with regard to medical causation in the current adjudication is, then, whether the Petitioner's current neurological conditions are the same or a natural progression of the conditions found by the former medical panel to be causally related to the industrial injury, or whether they represent conditions medically stemming from other causes.

FINDINGS OF FACT

Judge Elicerio's June 5, 1992 Findings of Fact are incorporated herein by reference.

FINDINGS OF FACT AND INTERIM ORDER

Denny Carradine, Case No. 05-0292

Page 3

In the current proceeding, the Petitioner is requesting permanent total compensation. The parties stipulated that the appropriate compensation rate is \$292.00 per week. The Petitioner last worked sometime in July 2000 and a more precise date was not put into evidence.

The Respondents claimed that the Petitioner was assaulted in 1998 and suffered head trauma. No description of an assault was placed into evidence. However, the medical records occasionally refer to a closed head injury occurring in 1998. In particular, in the record on ME Vol. II p. 25, the Petitioner is said to have been playing darts at a club when a man hit him from the side and he started going into a seizure and fell to the ground, hitting the back of his head on the floor and losing consciousness. He lay in bed for three days and then was taken to the hospital where he stayed for two weeks. The record indicates he had problems with speech but his ability slowly came back with therapy.

Dr. Edward Holmes attempted to evaluate the Petitioner. The Petitioner appeared for an independent medical evaluation at Dr. Holmes' office and met briefly with him, however the Petitioner declined to participate further, citing ongoing litigation with past medical providers at the University of Utah. Dr. Holmes therefore examined the Petitioner's medical records and submitted a report dated April 21, 2006. Dr. Holmes indicates that in their brief meeting the Petitioner could not write or hold papers still due to his tremor, and appeared extremely incapacitated and mentally very fragile, which would render him extremely limited in a work-like setting. Dr. Holmes concludes that there is no connection between the steroid injection in 1990 and the Petitioner's current conditions.

Dr. Mary Kay Hales, Neuropsychologist, evaluated the Petitioner. She testified that he is manifesting partial complex seizure and frontal lobe seizures, which are the same type of seizures that the Petitioner has had since the steroid injection. They have been called pseudo seizures and other like names by some individuals in the medical records. They are now known as non-epileptic seizures and can be caused by stress and changes in blood pressure and do not show up on an EMG. She testified that the Petitioner has difficulty with expression in language, memory, concentration, and has neurocognitive changes, that the Petitioner's condition has worsened over the years and that his facial droop has continued. His current neurological problems could possibly be related to the steroid injection. He has neurotoxicity. Dr. Hales opined that the Petitioner cannot work. The Petitioner's conditions of depression and anxiety have also worsened since the accident. Dr. Hales did indicate that the head injury the Petitioner suffered in 1998 could definitely have contributed to his neurological injuries.

The Petitioner has visited Christie Kane, a certified professional counselor every week for the past two years. Ms. Kane testified that the Petitioner's primary diagnosis is major depressive disorder with a secondary diagnosis of anxiety. He has multiple seizures frequently during their sessions. She opines that the Petitioner is unable to work due to his seizures, as well as short and long term memory loss, which render him incapable of retaining much of anything that he learns.

FINDINGS OF FACT AND INTERIM ORDER

Denny Carradine, Case No. 05-0292

Page 4

Additionally, Ms. Kane's records in the medical exhibit indicate that the Petitioner experiences blackouts and decreased strength, and that he was incapable of filling out some forms and gathering other information he needed. ME Vol. 1 p. 5.

The Petitioner exhibited tremors throughout the hearing and unfortunately suffered a seizure at the hearing. It was determined not to have him take the witness stand, however, the parties stipulated simply that his condition has become worse over the years (without any agreement as to the cause for the worsening).

DISCUSSION AND LEGAL CONCLUSIONS

Utah Code Annotated §34A-2-106(1)(a) indicates:

The Division of Adjudication may refer the medical aspects of a case described in this Subsection (1)(a) to a medical panel appointed by an administrative law judge.

Utah Administrative Code R602-2-2 outlines the when the case is required to be referred to a medical panel as follows:

- A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:
 - (i) Conflicting medical opinions related to causation of the injury or disease;
 - (ii) Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,
 - (ii) Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;
 - (iii) Conflicting medical opinions related to a claim of permanent total disability, and/or
 - (iv) Medical expenses in controversy amounting to more than \$10,000.

There are conflicting medical opinions regarding the causation of Petitioner's current conditions. Therefore the rule mandates referral to a medical panel.

ORDER

IT IS THEREFORE ORDERED that the medical aspects of this case are referred to a Labor Commission medical panel for further evaluation.

FINDINGS OF FACT AND INTERIM ORDER

Denny Carradine, Case No. 05-0292

Page 5

IT IS FURTHER ORDERED that the petitioner shall obtain and file with the judge IN A SINGLE SUBMISSION all radiology films (CDs will not be accepted) on or before August 31, 2006. Failure to submit the films without good cause will result in dismissal of the petitioner's Application for Hearing.

IT IS FURTHER ORDERED that as this is an Interim Order and not a Final Order, any Motion for Review or Appeal of this Order shall be reserved until the Final Order is issued in this matter. Accordingly, deadlines will respect to Motions for Review and/or Appeal shall not commence to run until after the Final Order is issued in this case.

Dated this 31st day of July, 2006



DEIDRE MARLOWE
Administrative Law Judge

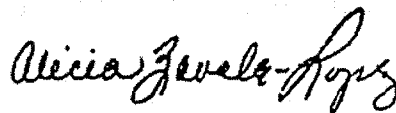
MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing instrument was mailed first class, postage prepaid, on the 31st day of July 2006 to the following:

Shawn W. Potter
Tesch Law Offices
P.O. Box 3390
Park City, UT 84060

Edwin C. Barnes
Clyde Snow Sessions & Swenson
201 S. Main Street, #1300
Salt Lake City, UT 84111

Hans M. Scheffler
Legal Department, Workers' Compensation Fund
392 E. 6400 S.
Salt Lake City, UT 84107



98-08553-817

RECEIVED

JUN 8 1992

Workers Compensation Fund
Legal Department

INDUSTRIAL COMMISSION OF UTAH

Case No. B90000768

DENNY M. HOFFMAN,

Applicant,

vs.

TRUE FLO MECHANICAL SYSTEMS, INC./
WORKERS COMPENSATION FUND OF UTAH,

Defendants.

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND ORDER

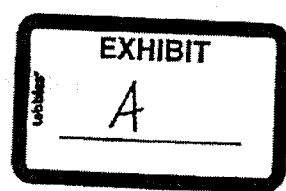
HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on September 17, 1990 at 8:30 o'clock a.m. Said hearing was cancelled at the request of the parties.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was represented by David Eckersley, Attorney.

The defendants were represented by Janet L. Moffitt, Attorney.

This case involves a claim for additional temporary total compensation, permanent impairment benefits and medical expenses related to a September 2, 1988 industrial accident. There was an attempt at settling the claim in the Fall of 1990, but the applicant was unwilling to accept the offer of the carrier and he then changed counsel. Additional negotiations went on between the parties thereafter and counsel finally agreed that the best way to resolve the case was to have the remaining disputed issues referred to a medical panel. The parties stipulated to waiving the hearing and in lieu of the hearing, the parties prepared a factual stipulation (outlining the relevant facts) to be sent to the medical panel. The matter was referred to the panel on January 6, 1992 and the panel report was received at the Commission on April 14, 1992. The report was distributed to the parties on April 15, 1992, with 15 days allowed for the filing of objections. No actual objections were filed, but counsel for the applicant did write the ALJ noting what appears to be a slight contradiction in the medical panel report. The matter was considered ready for order at the expiration of the 15 days for objections.



ORDER
RE: DENNY HOFFMAN
PAGE 2

FACT STIPULATION:

The parties stipulated to the following facts:

1. The applicant in this matter, Denny Hoffman, was injured on September 2, 1988 while working in the course and scope of his employment. At that time, he descended a ladder and missed a step, slipping and overcompensating. This resulted in a severe twist to his left knee.
2. The applicant was seen initially by a Dr. McCaa and was later referred to Dr. Gary Larsen. Dr. Larsen initially treated him on September 6, 1988 and indicated the applicant would be off work for approximately two weeks. Thereafter, Dr. Larsen referred the applicant for physical therapy and a course of conservative treatment was pursued over the next year. When Mr. Hoffman's knee did not improve, Dr. Larsen suggested diagnostic arthroscopy which was performed on December 20, 1988. This procedure revealed a torn medial meniscus, which was repaired on December 28, 1988 and indicated that the applicant would be ready for a full duty release on approximately February 6, 1989.
3. On January 24, 1989, the applicant slipped and fell on some ice while on his way to physical therapy. He was treated for this condition by Dr. Poulsen. Dr. Poulsen's notes indicated that the applicant injured his midback, coccyx, left foot, right wrist and shoulder and both knees. He was diagnosed as having multiple contusions with a back strain. X-rays were taken at that time and were found to be normal. On February 22, 1989, Mr. Hoffman reported to Dr. Larsen that he was suffering from headaches as a result of this fall. At this point, Dr. Larsen began treating the applicant for symptoms suffered from the fall. Dr. Larsen indicated that the applicant's shoulder problem represented a strain type of injury and he was sent to physical therapy for the shoulder as well as for the original problems with the left knee. In April of 1989, Dr. Larsen felt that the applicant might be able to return to work in about a month.
4. The last visit to Dr. Larsen apparently took place on June 12, 1989. At that time, Dr. Larsen's notes indicated that he felt he had done all he could to improve Mr. Hoffman's condition. As a result, Mr. Hoffman transferred his primary care to Dr. Alan T. Newman, at the University of Utah Medical Center. Dr. Newman suggested a conservative care again and some possible additional diagnostic arthroscopy. When Mr. Hoffman's condition did not improve as of August 1989, Dr. Newman suggested a procedure with surgery. Additional surgery was denied at that time.

ORDER
RE: DENNY HOFFMAN
PAGE 3

5. On October 3, 1989, Mr. Hoffman reinjured his knee while apparently getting out of a chair. On November 14, 1989, Dr. Newman rated Mr. Hoffman as having a 5% whole man impairment but he was not able to return to work at that time. In February 1990, the surgical procedure suggested by Dr. Newman for the applicant's knee was approved and carried out on March 2, 1990. Dr. Newman found that the applicant was stable as of June 5, 1990 as it related to his knee. Although the applicant's problems with his knee appeared to be resolving, he continued to have difficulties with his shoulder. In February 1990, Dr. Newman gave Mr. Hoffman a steroid injection in the shoulder. Mr. Hoffman indicated he felt he had had a severe allergic reaction to that injection which required hospitalization. Dr. Newman requested a CT arthrogram of the shoulder which was apparently read as normal. Dr. Newman referred Mr. Hoffman to Dr. Digre because of the allergic reaction. Dr. Digre requested an MRI, but before that could be accomplished, the applicant was admitted to the emergency ward with what appeared to some kind of a seizure problem. The applicant was taken by ambulance to St. Marks Hospital and then transported in the middle of the night to the University of Utah Medical Center. The diagnosis from the hospital stay is contained in the discharge diagnosis.

6. Because of the ongoing difficulties in trying to resolve appropriate treatment for the applicant, the Workers Compensation Fund of Utah referred the applicant to Drs. Nathaniel Nord and Boyd Holbrook in November of 1990. At that time, they rated the applicant's condition as being stable, indicating that he had a 5% permanent partial impairment of the left lower extremity as a result of the industrial injury. They also assigned a 5% impairment of the whole person to apparent neurological problems which developed from the slip and fall in January of 1989. They did not assign any permanent impairment to either the applicant's right knee or right shoulder as a result of the industrial injuries or the slip and fall in January of 1989. They did allow temporary total disability to the date of September 7, 1990, although they indicated that an earlier termination date was justifiable. Pursuant to that report, the Workers Compensation Fund of Utah submitted a Compensation Agreement to the applicant and his attorney for signature and proceeded to advance the monies due to the applicant to that agreement, although the Compensation Agreement was never signed. To date, the Workers Compensation Fund of Utah has paid \$40,638.25 in compensation benefits to the applicant.

7. At this time, the applicant disputes the fact that there is no permanent impairment to his right shoulder and also claims entitlement to additional temporary total disability based on treatment for the right shoulder. In addition, the applicant is claiming additional medical care for the shoulder problem which has been denied at this point by the Workers Compensation Fund of Utah. The Applicant also disputes that there is no impairment to his right knee and contends that he

ORDER
RE: DENNY HOFFMAN
PAGE 4

has ongoing neurologic difficulties associated with the steroid injections administered in February 1990. The parties would therefore request that a medical panel be assigned to address the issue of permanent partial impairment as it relates to his shoulder injury, his right knee, neurological problems, additional temporary total disability beyond September 7, 1990, and medical treatment beyond that date.

8. It is further agreed between the parties that in the event objections are filed to the medical panel report, the defendants shall have the opportunity of presenting video taped evidence as it concerns the applicant's actual physical abilities, pending, of course, provision of a copy of the said evidence to the applicant and his counsel.

THE MEDICAL PANEL REPORT:

The medical panel consisted of Chairman, Dr. M. Thomas, a neurologist, and Dr. A. Smoot, an orthopedist. The panel report notes that the applicant felt the medical problem that concerned him the most was the neurologic problems that he has been experiencing. Per the report, the second main concern that he had was his right shoulder. The applicant described to the panel problems with his hearing, vision problems (including double vision, problems when exposed to bright light, peripheral hallucinations and right eye focusing difficulties), right-sided headaches aggravated by bright light, episodes of difficulty breathing with coughing and chest pain, and some cognitive problems (difficulty spelling, writing, remembering, and doing coordinated activities). With respect to the right shoulder, the applicant described a drooping sensation with a hot burning feeling with activity. The applicant indicated that he felt pain and numbness in the arm with tingling in the hand when he tried reaching backwards. He described right hand swelling and pain radiating into the shoulder blade and chest on the right side. The applicant stated that his right knee was worse than the left knee, but that both were painful with certain activities.

The panel decided to have a number of tests performed. Psychologic testing was done with review by Dr. R. Burgoyne, a psychiatrist, who then consulted with the panel. An audiogram was done and ophthalmologic testing as well. An MRI scan of the brain was also done. After reviewing the testing and the medical records, and examining the applicant, the panel found that the applicant had a significant amount of impairment. Although the panel does not really discuss its conclusions at length, per the impairment chart, it appears that the panel determined that the neurological problems that the applicant has experienced are related to the reaction he had to the right shoulder steroid injection he received in February 1990. The panel rated the impairment resulting from the industrial accident as follows:

ORDER
RE: DENNY HOFFMAN
PAGE 5

- | | | |
|----|---------------------------------------|------------------|
| 1. | visual (partial optic atrophy) | 14% whole person |
| 2. | psychiatric | 10% whole person |
| 3. | right shoulder | 5% whole person |
| 4. | left knee | 4% whole person |
| 5. | right knee | 2% whole person |
| 6. | right facial nerve (residual paresis) | 2% whole person |

The impairment related to the right facial nerve is listed as both pre-existing and as all related to the industrial accident. The medical panel noted in its report that it presumed that the injury to the right shoulder, and the neurological problems resulting from treatment of the right shoulder, were related to the September 2, 1988 industrial injury, because these problems resulted due to the pursuit of treatment for the industrial injury. However, the panel noted that, if this was incorrect legally, an adjustment in the apportionment of the impairment might be in order. The panel found no additional temporary total compensation due beyond that which has already been paid.

CONCLUSIONS OF LAW:

No objections to the medical panel report were filed. In a letter dated May 4, 1992, counsel for the applicant pointed out the panel's apparent error in indicating that the right facial nerve impairment was both industrial and pre-existing. Counsel notes that he believes the panel meant to indicate that the impairment was related to the industrial accident, but acknowledges that opposing counsel could request clarification from the panel if there was disagreement with this analysis. As of the date of issuance of this order, no response to the May 4, 1992 letter was filed by counsel for the defendants and thus the ALJ presumes that counsel for the defendants agrees that the 2% whole person related to the right facial nerve was meant to be apportioned as industrial impairment.

Clearly the medical panel has made some legal conclusions in its analysis and this is not really appropriate as it not within the panel's area of expertise. At the same time, the ALJ realizes that the panel was having some difficulty in apportioning the impairment without making some kind of presumption with respect to the compensability of the right shoulder injury. The parties have indicated no objection to the panel's presumption and the ALJ has made a quick review of Larson's on the point of law involved and feels that the panel has followed the conventional legal approach in finding the right shoulder injury to be compensable (see A. Larson, Workmen's Compensation, Section 13.13 (Desk Ed.)). There being no objections to the medical panel report, the ALJ finds that the impairment listed above is all attributable to the September 2, 1988 industrial accident.

ORDER
RE: DENNY HOFFMAN
PAGE 6

BENEFITS DUE:

The panel found that the temporary total compensation due is what the Fund has already paid (from September 2, 1988 through September 7, 1990 or 105.142 weeks x \$333.00, or \$35,012.29). The impairment rated by the panel comes to a combined total of 32% whole person (per the AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed. revised, Combined Values Chart). The total in permanent impairment benefits payable is thus \$22,863.36 (312 weeks x .32 = 99.84 weeks x \$229.00). Total compensation due is thus \$57,875.65 (\$35,012.29 TTC + \$22,863.36 PPI). The Fund has already paid \$40,638.25 per the stipulation and thus \$17,237.40 remains due and owing (\$57,875.65 - \$40,638.25). As of June 6, 1992, 91 weeks of the remaining PPI due is accrued and due and payable in a lump sum, plus interest. The ALJ will presume that if the attorney generated any benefits prior to the issuance of this order, that he has been paid for the amount generated. Therefore, the ALJ will figure the attorneys fee based on the amount generated since the date of the stipulation (\$17,237.40). Per Industrial Commission rule R568-1-7, the attorney's fee is 20% of the first \$15,000.00 (\$3,000.00) + 15% of the remainder (\$335.61), or \$3,335.61.

ORDER:

IT IS THEREFORE ORDERED that the defendants, True Flo Mechanical System, Inc./Workers Compensation Fund of Utah, pay the applicant, Denny Hoffman, temporary total compensation at the rate of \$333.00 per week, for 105.142 weeks, or a total of \$35,912.29 for the period of temporary total disability related to the September 2, 1988 industrial accident from September 2, 1988 through September 7, 1990. That amount has already been paid per stipulation.


IT IS FURTHER ORDERED that the defendants, True Flo Mechanical System, Inc./Workers Compensation Fund of Utah, pay the applicant, Denny Hoffman, permanent impairment benefits at the rate of \$229.00 per week, for 99.84 weeks or a total of \$22,863.36 for the 32% whole person impairment resulting due to the September 2, 1988 industrial accident. As of June 6, 1992, \$20,839.00 is accrued and due and payable in a lump sum, plus interest at 8% per annum, and less the attorney fees award to be made below.

IT IS FURTHER ORDERED that the defendants, True Flo Mechanical System, Inc./Workers Compensation Fund of Utah, pay all medical expenses incurred as the result of the September 2, 1988 industrial accident; said expenses to be paid in accordance with the medical and surgical fee schedule of the Industrial Commission of Utah.

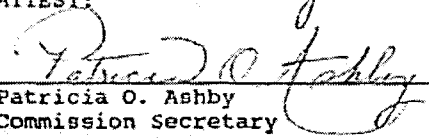
IT IS FURTHER ORDERED that the defendants, True Flo Mechanical System, Inc./Workers Compensation Fund of Utah, pay M. David Eckersley, attorney for the applicant, the sum of \$3,335.61 for services rendered in this matter, the same to be deducted from the aforesaid award to the applicant, and to be remitted directly to the office of M. David Eckersley.

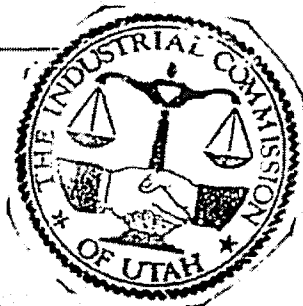
ORDER
RE: DENNY HOFFMAN
PAGE 7

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.


Barbara Elicerio
Administrative Law Judge

Certified by the Industrial Commission
of Utah, Salt Lake City, Utah, this
5th day of June, 1992.
ATTEST:


Patricia O. Ashby
Commission Secretary



CERTIFICATE OF MAILING

I certify that on June 5th, 1992, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Denny Hoffman, was mailed to the following persons at the following addresses, postage paid:

Denny Hoffman
4530 South 1300 West
Murray, UT 84123

M. David Eckersley
Attorney at Law
175 East 400 South, Suite 900
SLC, UT 84111

Janet L. Moffitt
Attorney at Law
Workers Compensation Fund of Utah
560 South 300 East
SLC, UT 84111

Erie V. Boorman
Administrator
Employers Reinsurance Fund

INDUSTRIAL COMMISSION OF UTAH

By Wilma Burrows
Wilma Burrows
Adjudication Division

Attachment C

UTAH LABOR COMMISSION
ADJUDICATION DIVISION

DENNY CARRADINE,
Petitioner,

vs.

TRUE FLO MECHANICAL SYS INC
and/or EMPLOYERS REINSURANCE
FUND; WORKERS COMPENSATION
FUND,

Respondent.

ORDER OF DISMISSAL

Case No. 05-0292

Judge: DEIDRE MARLOWE

On July 31, 2006 I issued Findings of Fact and Interim Order referring the case to a medical panel. By copy of a letter dated October 2, 2006 I notified Mr. Carradine that his case was being sent to Dr. Alan Goldman as chair of the panel.

Dr. Goldman's office made diligent efforts to schedule an evaluation for Mr. Carradine at a time convenient for him. Dr. Goldman's assistant left three messages asking him to return the call in order to schedule an appointment. Mr. Carradine did not return the call.

Dr. Goldman's office then informed me that they had not been successful in contacting Mr. Carradine. I requested Dr. Goldman's office to schedule an appointment and notify Mr. Carradine of the appointment in writing. Joyce McNeill, R.N. of Dr. Goldman's office then wrote a letter to Mr. Carradine on November 22, 2006 notifying him that an appointment had been scheduled on December 1, 2006 at 9:30 am. On November 30, 2006 (less than 24 hours prior to the scheduled appointment) an unidentified female left a message at Dr. Goldman's office indicating that he would not appear for the appointment.

Mr. Carradine has wasted Dr. Goldman's time and resources and also that of the Adjudication Division, which has paid a no-show fee for Mr. Carradine's missed appointment in addition to Dr. Goldman's time in reviewing the case. Apparently Mr. Carradine is unable or unwilling to comply with litigation requirements at this time.

Based on the foregoing:

IT IS HEREBY ORDERED that the "Application for Hearing" filed by Denny Carradine against True Flo Mechanical Sys Inc, Employers Reinsurance Fund, and Workers Compensation Fund is dismissed without prejudice, meaning that he can file another application for hearing in the future when he is prepared to comply with litigation requirements.

ORDER OF DISMISSAL
Denny Carradine, Case No. 05-0292
Page 2

DATED this 22 day of December 2006



Deidre Marlowe
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Order of Dismissal was mailed by prepaid U.S. postage on this 22 day of December 2006, to the persons/parties at the following addresses:

Shawn W. Potter
Tesch Law Offices
P.O. Box 3390
Park City, UT 84060

Edwin C. Barnes
Clyde Snow Sessions & Swenson
201 S. Main Street, #1300
Salt Lake City, UT 84111

Hans M. Scheffler
Legal Department, Workers' Compensation Fund
392 E. 6400 S.
Salt Lake City, UT 84107

UTAH LABOR COMMISSION



Clerk, Adjudication Division

Attachment D



State of Utah

Labor Commission
SHERRIE HAYASHI
Commissioner

Adjudication Division
RICHARD M. LAJEUNESSE
Division Director

JOHN N, JR.
GARY R. HERBERT
Lieutenant Governor

October 12, 2007

Edwin C. Barnes
Clyde Snow Sessions & Swenson
201 S. Main Street, #1300
Salt Lake City, UT 84111

Shawn W. Potter
Tesch Law Offices
P.O. Box 3390
Park City, UT 84060

Hans M. Scheffler
Legal Department, Workers' Compensation Fund
392 E. 6400 S.
Salt Lake City, UT 84107

Re: Denny Carradine vs. True Flo Mechanical Systems Inc., Employers Reinsurance
Fund; Workers Compensation Fund, Case No. 07-0490

Dear Counsel:

The purpose of this letter is to give you some direction for the hearing coming up on October 25, 2007. As you are aware a hearing was already held on April 26, 2006 and I issued Findings of Fact on July 31, 2006. Therefore, the upcoming hearing is not to repeat the prior hearing and present the same witnesses and evidence (or to introduce evidence which was available at the time of the prior hearing, but not presented).

Instead I would like you to focus on anything new about the claim that has occurred since April 26, 2006 and present any relevant evidence that was not available previously. Specifically, please focus on any changes in the Petitioner's condition and identify any new pages in the medical exhibit which were not in the previous exhibit. Please let me know if you have any questions.

Very truly yours,

Deidre Marlowe
Administrative Law Judge

Attachment E



State of Utah

Labor Commission
SHERRIE HAYASHI
Commissioner

Adjudication Division
RICHARD M. LAJEUNESSE
Division Director

JON M. HUNT, JR.
Governor
GARY R. HERBERT
Lieutenant Governor

May 19 2008

DENNY CARRADINE
578 S REDWOOD RD
SALT LAKE CITY UT 84104

HANS SCHEFFLER ESQ
392 E 6400 S
SALT LAKE CITY UT 84107

SHAWN W POTTER ESQ
TESCH LAW 314 MAIN ST #200
BOX 3390
PARK CITY UT 84060

WENDY B CROWTHER ESQ
201 S MAIN ST STE 1300
SALT LAKE CITY UT 84111

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

RE: Denny Carradine vs. True Flo Mechanical Sys Inc and/or Workers Compensation Fund; EMPLOYERS REINSURANCE FUND
Case Number 07-0490

NOTICE TO THE PARTIES

I am enclosing a copy of the Report of Medical Panel in this case. You are allowed fifteen (15) calendar days from the date of this letter to file objections. Please specify in detail the basis for your objections and mail copies to all parties. If no written objections are filed within that period, the Report of the Medical Panel will be deemed admitted into evidence and I will decide the matter on the record as then constituted.

Dated this May 19, 2008.

Deidre Marlowe
Administrative Law Judge

Enclosure

RECEIVED
MAY 20 2008

OFFICES P.C.
client copy mailed 5/21/08

ALAN J. GOLDMAN, M.D.
A Professional Corporation
Consulting Neurology
Diplomate, American Board of Neurology and Psychiatry

5250 S. Commerce Dr., Suite 200
Salt Lake City, Utah 84107

Phone: (801) 314-2308 Salt Lake Office
FAX: (801) 314-2413

State of Utah
Labor Commission

MAY 16 2008

Received
Salt Lake Office

May 2, 2008

Judge Deidre Marlowe
c/o State of Utah Labor Commission
Adjudication Division
160 East 300 South
Third Floor
Salt Lake City, Utah 84114

Re: Denny Carradine
DOI: 09-02-88
Case No.: 05-0292
Employer: True Flow Mechanical Systems, Inc.
Date of examination: 05-02-08

Dear Judge Marlowe:

I examined Denny Carradine on May 2, 2008 in my role as a Medical Panel Chairperson for the State of Utah Labor Commission. Prior to my evaluation, I reviewed the *Medical Exhibit A [Volumes I & II]*, the Medical Panel report of Drs. Madison Thomas and A. Owen Smoot [01-29-92], Judge Barbara E. Licerio's 06-05-92 *Order*, the *Amended Findings of Fact*, your *Interim Order*, and the images that accompanied your April 10, 2008 cover letter. Mr. Carradine was accompanied to the evaluation by his fiancé, Susie Justesen, who assisted with some aspects of the history. Upon meeting Mr. Carradine, I advised him that I would not be serving as a treating physician, that the purpose of today's contact was evaluative in nature, and that I would be sending my report directly to your office. It was my opinion that Mr. Carradine and Ms. Justesen completely understood the parameters of today's Medical Panel contact.

HISTORY OF PRESENT ILLNESS

Pre-Injury Employment: Mr. Carradine was the owner of a heating, ventilation, and air conditioning company. On September 2, 1988, he was descending a ladder from a roof where an air conditioning unit had been installed, mis-stepped, and dropped approximately 8-10 feet to the ground, severely twisting his left knee.

Re: Denny Carradine

May 2, 2008

Page Two

Post-Injury Treatment: Mr. Carradine has had a 20 year history of medical contacts. On 12-20-98, he underwent an arthroscopic left knee partial medial meniscectomy by Dr. Gary Larsen, for a torn medial meniscus. Following a post-operative physical therapy session, Mr. Carradine slipped and fell on some ice [01-26-89], sustaining an injury to his mid and low back, coccyx, bilateral knees, right wrist, right shoulder, and left foot. He also had headaches. Although Dr. Edward Spencer, in his 09-08-89 Orthopedic Surgical Independent Medical Evaluation opined that Mr. Carradine had a "Somatoform Pain Disorder and a mild rotator cuff impingement syndrome, the major problem seems to be psychogenic", a 5% Whole Person Impairment was awarded.

Mr. Carradine continued to complain of right shoulder pain. A CT arthrogram [04-27-90] was normal as was a right shoulder x-ray [06-26-89]. Two subacromial steroid injections were undertaken, with Mr. Carradine having what was thought to be an idiosyncratic drug reaction to the second such injection [02-27-89].

The Medical Exhibit, thereafter, outlined a number of emergency room visits, physician contacts, multiple diagnostic studies, psychiatric evaluations with psychometric testing, and several hospital in-patient stays for what were said to be the sequela to this injection. Mr. Carradine was fully evaluated at the University of Utah Medical Center, Department of Neurology in July, 1990. Dr. Fumisuke Matsuo opined, on discharge, that Mr. Carradine had migraine headaches, depression, accommodation spasm of the right eye with subsequent decreased vision, bilateral symmetric sensory neural hearing loss, and a possible mild right peripheral seventh nerve root paresis. Several EEGs were unremarkable, including one [07-07-90] during which time Mr. Carradine exhibited "limb jerking and abnormal sensation intermittently". Imaging of the brain [07-08-90; 03-18-92; 06-10-04; 10-04-04] was normal, although in the last such study [an MRI], gliosis [scarring] was noted in the bilateral temporal and frontal lobes, left greater than right, probably in associated with a 1998 head trauma resulting in intracranial bleeding into the frontal and temporal regions.

Mr. Carradine was examined psychologically a number of times with the consideration of his "blackout spells" being non-organic in nature. On 03-03-92, Dr. Susan McNamara obtained psychometric testing and reported that Mr. Carradine "experiences a fair amount of mental confusion and disorganization consistent with memory and problem solving difficulties.... this results in mild impairment for ADLs and social functioning". A limited course of cognitive therapy was recommended. Psychological counseling was undertaken in 2005 with Christy B. Kane, for "blackouts which appear to be seizures, memory loss, decreased strength, and depression". A psychiatric evaluation with Dr. Mary Hale [03-17-06] reported that Mr. Carradine had "headaches, tachycardia, nightmares, feels tense, depressed, unable to relax, has financial problems, dizziness, fatigue, memory problems, concentration difficulty, fainting spells, no appetite, insomnia, tremors, and cannot make decisions". On April 21, 2006, Dr.

Re: Denny Carradine
May 2, 2008
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Edward Holmes authored an Occupational and Environmental Medicine Evaluation and opined that Mr. Carradine "was extremely incapacitated..... and also mentally very fragile". Dr. David Smith [01-10-06] neurologically diagnosed Mr. Carradine as having uncontrolled focal motor and grand mal seizures along with "alterations of consciousness, of other causes" but, after reviewing several EEGs, did not believe that Mr. Carradine was having "seizure activity". Dr. Smith went on to state, "I do not know what is causing these tremors....". A final neuropsychological evaluation by Dr. Hales [08-29-06; 08-31-06] inclusive of extensive psychometric testing, led to her diagnostic listing of "toxic effect of drugs, medicinal or biological substances, partial seizures with impairment of consciousness, encephalopathy NOS, disturbance of sleep/wake cycle, mood disorder due to chronic medical problems, and an anxiety disorder due to chronic medical problems". Psychiatric contact was recommended, inclusive of cognitive rehabilitation. It was suggested that Mr. Carradine be considered for permanent disability through the Office of the Social Security Department. It was also recommended that Mr. Carradine maintain contact with his primary care physician for "medications which may assist with regulation of sleep" and for a psychiatrist to consider "the best medications for reduction of symptoms of depression and anxiety".

Current Status: Mr. Carradine continues to have "spells" with the last such event occurring approximately five days prior to this evaluation. Mr. Carradine "sometimes" is aware that he is about to have a "spell" as he will feel hot throughout his body, his eyes will start watering, he will sweat, his vision will diminish and blur in both eyes, and he then "black outs". Both he and Ms. Justesen said that, from time-to-time, he will go to the ground and be non-responsive. Emotion or "stress" seems to bring on these episodes as can coughing. Episodes can last anywhere from 1 minute to four hours but, in the longer episodes, Mr. Carradine, as described by Ms. Justesen, will "come and go" out of responsiveness. He frequently will simply "lie there" with no tonic nor clonic muscle activity, although he may "twitch" in any of his extremities prior to an episode. He will frequently be confused after an episode and take a nap. It may take one or two days before he is back to his baseline.

Although Mr. Carradine was, at one time, on Dilantin [an anti-convulsant], both he and Ms. Justesen noted that this medication "caused more spells than he had without the medication".

Mr. Carradine claims that he has pain in his right shoulder and bilateral knees, all of the time. "Once in a while", he will have low back pain. He has difficulty with concentration and forgetfulness. His hearing is diminished bilaterally. He still has continual visual blurring, more so in association with the above stated spells. He has difficulty sleeping and notes a "shaking" of his whole body, especially the extremities, while sleeping.

Mr. Carradine has not worked since the 09-02-88 injury. He did sustain a significant head trauma in 1998 but is uncertain as to any other traumas. He is currently taking prescription medications

Re: Denny Carradine
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Page Four

for blood pressure. He is in no supervised physical therapy nor receiving chiropractic care. Both he and Ms. Justesen stated that Mr. Carradine has been at a plateau since the time of his injury. Over the last number of years, however, there has been a decrease in his memory.

On a scale of zero to ten with ten being the pain that he has ever had, Mr. Carradine rates his average pain as an eight, "depending upon what I do".

Mr. Carradine is currently not seeing a psychologic counselor. His primary treating physician is Dr. Tran at a West Valley clinic.

EXAMINATION

General Medical Examination

General: Mr. Carradine is a well-developed, well-nourished male, with a somewhat disheveled appearance. He appeared to be in no distress.

Vital Signs:

Blood Pressure	148/92 mmHg (Rt. Arm Sitting)
Pulse	80 beats per minute
Respiration	16 per minute

Head & Neck: There was no acute trauma to the head or neck. There were no intracranial or carotid bruits.

Neurologic Examination

Mental Status: Mr. Carradine is awake and oriented. There was no aphasia nor dysarthria. At times, he did appear to be anxious but, with the assistance of Ms. Justesen, he was able to calm himself down. Formal mental status testing was not undertaken. Mr. Carradine did have a sense of humor. He followed all directions appropriately.

Sensation: Light touch with the examining hand is diminished in the left upper and lower extremities. Vibration was diminished in the left upper extremity. Pin prick was diminished in the right lower extremity.

Motor Exam: Normal bulk, tone and strength in all four extremities on force-against-force testing, although a suggestion [5-/5] of a right proximal arm weakness was raised.

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May 2, 2008
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Cranial Nerves: Pupils were myotic bilaterally. Fundoscopic examination could not be undertaken. A right facial droop was noted, although elevation of the frontalis musculature was present. No other gross cranial nerve abnormalities were noted.

Reflexes:

Reflex	Right	Left
Biceps	2+	2+
Triceps	2+	2+
Brachioradialis	2+	2+
Patellar	2+	2+
Achilles	2+	2+
Plantar Responses	*	*
Pathologic Reflexes	None	None

*Flexor on the right but with a questionable extension on the left [equivocal]. No definitive pathologic reflexes were otherwise noted.

Coordination: There was a mild head titubation, off and on, and a slight tremor/shake in the right upper extremity at rest. There were no true Parkinsonian movements, rigidity, or cog-wheeling. Romberg examination was normal. Gait was normal with no ataxia nor apraxia. Upper extremity dexterity is normal.

DISCUSSION

The Medical Panel will now address the single question that was raised in your April 10, 2008 cover letter. Prior to addressing that question, however, I wish to reiterate your comment in the *Amended Findings of Fact* that "it has already been concluded, legally and medically, that the steroid injection caused the Petitioner's neurological conditions as encountered by the Medical Panel in 1992".

1. Is the petitioner's current neurological and psychological condition the same or a natural progression of his conditions resulting from the industrial accident and/or the 1990 steroid injection?

Response: Yes.

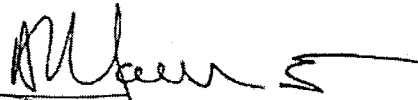
Re: Denny Carradine
May 2, 2008
Page Six

Mr. Carradine presents with an extremely complex neurological/psychological interaction and situation. Although it is my opinion that a number of his "spells" are not organically based, [there is excellent documentation of him having spells with no simultaneous EEG recording of epileptogenic discharges], careful review of all of the medical records and the interview with Mr. Carradine and his fiancé make me feel that some of his spells are consistent with probable partial complex seizures with possible progression thereafter to generalized seizures. To the organicity of these episodes, I will again comment on a significant head trauma in 1998 with CT scan evidence of intra-parenchymal blood and an MRI of the brain [10-04-04] showing "post-traumatic gliosis in the bilateral frontal and temporal lobes, left greater than right", which could easily serve as an organic seizure focus. As Mr. Carradine notes the frequency, severity, and description of his "spells" to be unchanged over almost 20 years, however, it is difficult to know the exact clinical correlation of those MRI findings.

Although both Mr. Carradine and Ms. Justesen claim that Mr. Carradine has had a progression of his memory difficulties, it is significant to note that as early as 1990 he was no longer taking care of his own financial needs. I suspect, within reasonable medical probability, that we are seeing the natural progression of his underlying brain and psychological dysfunctions resulting from the industrial accident of 09-02-88 and/or the 1990 steroid injection.

I thank you very much for allowing me to examine Denny Carradine. Please be advised that the entire history, physical examination, review of the *Medical Exhibits*, legal documents, and the history, physical examination, dictation, and editing of this report were performed solely by me. Please also be advised that I have never attempted to achieve a doctor/patient relationship with Denny Carradine.

Sincerely,



ALAN J. GOLDMAN, M.D.

Diplomate, American Board of Neurology & Psychiatry
Medical Panel Chairperson

AJG/dh

Attachment F

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

DENNY CARRADINE, Petitioner, vs. TRUE FLO MECHANICAL SYSTEMS INC., WORKERS' COMPENSATION FUND; EMPLOYERS REINSURANCE FUND, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR SUBSISTENCE BENEFITS Case No. 07-0490 Judge Deidre Marlowe
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Hearings: October 25, 2007

Appearances:

Shawn W. Potter for the Petitioner

Hans Scheffler for the Workers' Compensation Fund

Elliott Lawrence for the Employer's Reinsurance Fund

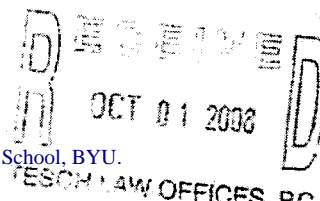
Denny Carradine¹ filed an application for hearing on March 25, 2005 requesting permanent total compensation. The Petitioner claimed that on September 2, 1988 he was injured after he fell down a ladder and injured his knees, right shoulder, neck, and nervous systems, including optic nerve damage and hearing loss.

True Flo Mechanical Systems Inc. and the Workers Compensation Fund ("WCF") filed an Answer on May 3, 2005. The WCF asserts it paid compensation to the Petitioner according to an order issued by Judge Elicerio in 1992, and that it continues to pay medical expenses also awarded in that order. It asserts that the Petitioner is not permanently and totally disabled.

The Employers Reinsurance Fund (ERF) filed an Answer on April 8, 2005 wholly denying the claim.

An evidentiary hearing was held on April 26, 2006 after which Findings of Fact and Interim Order was issued on July 31, 2006. However the case was dismissed without prejudice upon the Petitioner's failure to cooperate with the medical panel evaluation. The Petitioner filed his claim again in the present case. On October 25, 2007 an evidentiary hearing was held to allow the parties to submit any new information, and specifically medical evidence, regarding the Petitioner's claim occurring since the prior hearing. Then, Amended Findings of Fact and Interim Order was issued on October 31, 2007 January 31, 2008, determining that the case

¹ The Petitioner was formerly known as Denny Hoffinan.



needed to be sent to a medical. I assigned Dr. Alan Goldman to chair the panel. The medical panel reviewed the Amended Interim Findings, Judge Elicerio's findings, medical records, diagnostics, and examined the Petitioner. The medical panel then filed a report on May 16, 2008 with the Adjudication Division. Copies were promptly distributed to the parties. No objections were filed, and the report is admitted into evidence. The case is now ready for final order.

SUMMARY OF PRIOR ADJUDICATION

The Findings of Fact, Conclusions of Law and Order issued by Judge Elicerio on June 5, 1992 is attached as Exhibit A (Case No. B90000768).

To sum, the Petitioner was injured on September 2, 1988 while descending a ladder. He missed a step, slipping and overcompensating. This resulted in a severe twist to his left knee.

The Petitioner was treated conservatively for a year and then a diagnostic arthroscopy was performed on December 20, 1988; a torn medical meniscus was repaired a week later. On January 24, 1989 the Petitioner slipped and fell on some ice while on his way to physical therapy for his knee. In this fall he injured and was treated for his midback, coccyx, left foot, right wrist, right shoulder, both knees, contusions, and headaches. The right shoulder injury was considered to be a strain type injury and the Petitioner was sent to physical therapy for both the shoulder and the original left knee injury.

Conservative care was continued under Dr. Alan T. Newman. However, on October 3, 1989 the Petitioner reinjured his knee while getting out of a chair. On March 2, 1990 the Petitioner had another surgery on his knee. After that the knee appeared to be resolving but the Petitioner continued to have difficulty with his shoulder. In February 1990 the Petitioner had a steroid injection into his shoulder which he alleged caused a severe allergic reaction and led to seizures, hospitalization, and ongoing neurological issues.

The case was sent to a medical panel. The neurological issues considered by the panel were: hearing, vision (including double vision, problems when exposed to bright light, peripheral hallucinations and right eye focusing difficulties) right-sided headaches, episodes of difficulty breathing with coughing and chest pain, and cognitive problems (difficulty spelling, writing, remembering, and performing coordinated activities). The panel gave the following impairment ratings: visual (partial optic atrophy) 14% whole person; psychiatric 10% whole person; right shoulder 5% whole person; left knee 4% whole person; right knee 2% whole person; and right facial nerve (residual paresis) 2% whole person.

Judge Elicerio concluded that all of these conditions were legally and medically causally connected to the September 2, 1988 industrial injury and awarded benefits. Review was not requested and her order became final on July 5, 1992. This means that it has already been concluded legally and medically that the steroid injection caused the Petitioner's neurological conditions as encountered by the medical panel in 1992. The sole question with regard to medical causation in the current adjudication is, then, whether the Petitioner's current

neurological conditions are the same or a natural progression of the conditions encountered by the former medical panel. If so, by operation of law they are still medically causally related to the injury and the Respondents remain liable. Respondents cannot re-litigate this issue that has already been decided.

FINDINGS OF FACT

Judge Elicerio's June 5, 1992 Findings of Fact are incorporated herein by reference.

In the current proceeding, the Petitioner is requesting permanent total compensation. The parties stipulated that the appropriate compensation rate is \$292.00 per week. The Petitioner last worked sometime in July 2000 and a more precise date was not put into evidence.

The Respondents claimed that the Petitioner was assaulted in 1998 and suffered head trauma. No description of an assault was placed into evidence. However, the medical records occasionally refer to a closed head injury occurring in 1998. In particular, in the record the Petitioner is said to have been playing darts at a club when a man hit him from the side and he started going into a seizure and fell to the ground, hitting the back of his head on the floor and losing consciousness. He lay in bed for three days and then was taken to the hospital where he stayed for two weeks. The record indicates he had problems with speech but his ability slowly came back with therapy.

Dr. Edward Holmes attempted to evaluate the Petitioner. The Petitioner appeared for an independent medical evaluation at Dr. Holmes' office and met briefly with him, however the Petitioner declined to participate further, citing ongoing litigation with past medical providers at the University of Utah. Dr. Holmes therefore examined the Petitioner's medical records and submitted a report dated April 21, 2006. Dr. Holmes indicates that in their brief meeting the Petitioner could not write or hold papers still due to his tremor, and appeared extremely incapacitated and mentally very fragile, which would render him extremely limited in a work-like setting. Dr. Holmes concludes that there is no connection between the steroid injection in 1990 and the Petitioner's current conditions.

Dr. Mary Kay Hales, Neuropsychologist, evaluated the Petitioner. She testified that he is manifesting partial complex seizure and frontal lobe seizures, which are the same type of seizures that the Petitioner has had since the steroid injection. They have been called pseudo seizures and other like names by some individuals in the medical records. They are now known as non-epileptic seizures and can be caused by stress and changes in blood pressure and do not show up on an EMG. She testified that the Petitioner has difficulty with expression in language, memory, concentration, and has neurocognitive changes, that the Petitioner's condition has worsened over the years and that his facial droop has continued. His current neurological problems could possibly be related to the steroid injection. He has neurotoxicity. Dr. Hales opined that the Petitioner cannot work. The Petitioner's conditions of depression and anxiety have also worsened since the accident. Dr. Hales did indicate that the head injury the Petitioner suffered in 1998 could definitely have contributed to his neurological injuries.

Dr. Hales performed a neuropsychological evaluation of the Petitioner at the end of August 2006. In her report she indicates that the severity and frequency of the seizures appears to have worsened over the years, the type of seizure activity, as well as the symptoms and characteristics surrounding the seizures has not changed substantially in the last approximately 15 or 16 years. ME p. 15. She recommended that the Petitioner be given sleep medications; be evaluated by a cognitive rehabilitation therapist and given therapy if appropriate; consult with a psychiatrist regarding depression and anxiety medication; continue to work with a psychologist or therapist. The Petitioner's probability of recovery to the point of being able to work is extremely low. ME p. 55, 56.

The Petitioner has visited Christie Kane, a certified professional counselor every week for the two years prior to the April 2006 hearing. Ms. Kane testified that the Petitioner's primary diagnosis is major depressive disorder with a secondary diagnosis of anxiety. He has multiple seizures frequently during their sessions. She opines that the Petitioner is unable to work due to his seizures, as well as short and long term memory loss, which render him incapable of retaining much of anything that he learns. Additionally, Ms. Kane's records in the medical exhibit indicate that the Petitioner experiences blackouts and decreased strength, and that he was incapable of filling out some forms and gathering other information he needed.

The Petitioner exhibited tremors throughout the hearing and unfortunately suffered a seizure at the hearing. It was determined not to have him take the witness stand, however, the parties stipulated simply that his condition has become worse over the years (without any agreement as to the cause for the worsening).

Amended Findings of Fact and Interim Order was issued on January 31, 2008, determining that the case needed to be sent to a medical. I assigned Dr. Alan Goldman to chair the panel. The medical panel reviewed the Amended Interim Findings, Judge Elicerio's findings, medical records, diagnostics, and examined the Petitioner. The medical panel then filed a report on May 16, 2008 with the Adjudication Division.

The medical panel was asked whether the Petitioner's current neurological and psychological conditions are the same or a natural progression of his industrial-related conditions. The medical panel opined affirmatively that the Petitioner's present condition, within reasonable medical probability, is a natural progression of his underlying brain and psychological dysfunctions resulting from the industrial accident of 9/2/88 and/or the 1990 steroid injection.

1. Causation

Findings of legal and medical causation were made in Judge Elicerio's order. The new medical causation issue appropriate for the current proceeding is whether the Petitioner's industrial conditions are still the same or a natural progression of those conditions as found by Judge Elicerio. I conclude that the preponderance of the evidence shows that the Petitioner's industrial injuries, including those already found to be medically caused by the steroid injection,

are a natural progression of those found in Judge Elicerio's order. Thus the Petitioner is entitled to appropriate benefits.

2. Permanent Total Compensation

Utah Code Section 34A-2-413 provides in relevant part:

(1)(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

- (i) the employee sustained a significant impairment or combination of impairment as a result of the industrial accident or occupational disease tickets rise to the permanent total disability entitlement;
- (ii) the employee is permanently totally disabled; and
- (iii) the industrial accident or occupational disease was a direct cause of the employee's permanent total disability.

a. Significant Impairment

It is abundantly clear that the Petitioner suffers from a significant impairment resulting from his industrial injuries as he has great cognitive difficulties and suffers from ongoing seizures.

b. Permanent total disability

1) the Petitioner has not been gainfully employed since at least August 1, 2000.

2) the Petitioner is not able to perform basic work activities in that he does not have the ability to report for work and remain there for a typical day, and does not have the degree of flexibility, strength, comprehension, and ability to communicate that is required by the broad range of modern jobs.

3, 4) The Petitioner clearly is not able to perform previous work or any work that might be reasonably available because of his clear lack of medical ability and functional capacity due to his nervous system disorders. Dr. Holmes indicated that in his brief meeting with the Petitioner that the Petitioner could not write or hold papers still due to his tremor, and appeared extremely incapacitated and mentally very fragile, which would render him extremely limited in a work-like setting. The Petitioner proves these elements.

c. Direct cause

It is the industrial injuries and neurological problems which have been found to result from the steroid injection that are responsible for the Petitioner's permanent total disability. Therefore he meets this element.

3. Rehabilitation

A finding of permanent total disability is not final unless otherwise agreed by the parties until a reemployment plan has been submitted and reviewed by the commission or the commission receives notice that no reemployment plan will be submitted, and the commission holds a hearing to consider evidence relating to rehabilitation and review of the reemployment plan, if any. Prior to entering a final order the commission shall order permanent total disability compensation to provide for the employee's subsistence. Utah Code Section 34A-2-413.

Pertinent orders are given below.

ORDER

IT IS HEREWITH ORDERED THAT the Respondents, True Flo Mechanical Systems Inc., Workers Compensation Fund and/or the Employers Reinsurance Fund, shall pay the Petitioner subsistence benefits in the amount of \$292.00 per week beginning August 1, 2000, according to the permanent disability compensation statute, less credit for permanent partial compensation paid and less attorneys fees awarded below. Payment shall continue until further order of the Commission. Further benefits are to be determined after accomplishment of the procedures set forth in Utah Code § 34A-2-413(6).

IT IS FURTHER ORDERED that True Flo Mechanical Systems Inc., Workers Compensation Fund, and/or the Employers Reinsurance Fund, shall pay Shawn W. Potter attorney's fees based on the compensation generated in this matter pursuant to R602-2-4, Utah Administrative Code.

IT IS FURTHER ORDERED that the Respondents shall have 30 days from the date of this order to determine and notify the ALJ in writing whether a rehabilitation plan will be submitted pursuant to Utah Code § 34A-2-413(6). If the Respondent timely requests rehabilitation, such plan shall be submitted within 90 days of the date of this order.

DATED this 30th day of September 2008.



Deidre Marlowe
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this

decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

Denny Carradine vs. True Flo Mechanical Sys Inc and/or Workers Compensation Fund;
EMPLOYERS REINSURANCE FUND Case No. 07-0490

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER FOR SUBSISTENCE BENEFITS was mailed by
prepaid U.S. postage on September 30, 2008, to the persons/parties at the following addresses:

Denny Carradine
578 S Redwood Rd
Salt Lake City UT 84104

Shawn W Potter Esq
Tesch Law 314 Main St #200
Box 3390
Park City UT 84060

Hans Scheffler Esq
392 E 6400 S
Salt Lake City UT 84107

Wendy B Crowther Esq
201 S Main St Ste 1300
Salt Lake City UT 84111

UTAH LABOR COMMISSION



Clerk
Adjudication Division

Attachment G

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
Heber M Wells Building, 3rd Floor
P O Box 146615
Salt Lake City UT 84114
(801) 530-6800

DENNY CARRADINE,
Petitioner,

vs.

**TRUE FLO MECHANICAL SYSTEMS,
INC., WORKERS' COMPENSATION
FUND; EMPLOYERS' REINSURANCE
FUND,**
Respondents.

ORDER

Case No. 07-0490

Judge Deidre Marlowe

Amended Findings of Fact, Conclusions of Law and Order for Subsistence Benefits was issued on April 30, 2009. On or about May 29, 2009 the Petitioner filed a Motion for Review. Contained in the Motion for Review is a motion to re-open the evidentiary record. At the Labor Commission, if the Administrative Law Judge determines that the parties have raised valid concerns in a Motion for Review, the ALJ has the option to revise his or her order in lieu of sending the case to the Commissioner, or at least revising certain portions of the order before sending the case on to the Commissioner, if the revisions do not resolve disputes.

For this reason I have considered the Petitioner's motion to reopen the record. I conclude that reopening the record is not warranted, as discussed below.

The Order which is the subject of the Motion for Review was issued on April 30, 2009. In this order I concluded that the Petitioner was permanently totally disabled and that his permanent total disability compensation payments were to start on August 1, 2000. The Petitioner desires now to reopen the record to show evidence that he became permanently and totally disabled sometime in 1992, and that his compensation should begin approximately 8 years earlier than I have concluded in my most recent order. I conclude that the Petitioner has had more than adequate opportunity to present evidence concerning this issue, but did not take advantage of these opportunities and now is barred from reopening the record to present an issue upon which evidence was known and available or should have been known and available to him at least from the filing of his permanent total disability claim in 2005.

This case has an unusually long procedural history. Relevant for this motion are the following: The Petitioner filed a claim of permanent total disability on March 25, 2005 regarding an industrial injury date of September 2, 1988. On the application for hearing, in answer to question No. 4 about time off work, the Petitioner replied that his time off work had

been intermittent since the day of injury "to present." On the accompanying forms, he indicated "Applicant was employed until approximately 2001. Applicant has sought casual employment on occasion but has not been able to remain employed."

An evidentiary hearing was held on April 26, 2006. At the beginning of the hearing the following conversation took place:

-Judge: Mr. Potter, what day does the claim start? From what day is the Petitioner claiming perm total?"

Mr. Potter: The original, are you asking what [inaudible¹] it was?

Judge: OK but the application says he's worked intermittently from that date, so when are you claiming that the perm total compensation should start?

Mr. Potter: The last day of work would be 2001 and I'm [inaudible] date. [Long pause]
According to [inaudible] the last date of work was July 2000.

Judge: OK.

Hearing Record of April 26, 2006, starting at 2 minutes 24 seconds.

At the hearing, the Petitioner suffered a seizure and was not able to take the witness stand. I issued Findings of Fact and Interim Order on July 31, 2006, determining that the case needed to be sent to a medical panel. In this Order I made a finding of fact as follows: "The Petitioner last worked sometime in July 2000 and a more precise date was not put into evidence." I then sent the case to a medical panel. However, the case was dismissed without prejudice when the Petitioner refused to cooperate with the medical panel evaluation.

The Petitioner filed his claim again in the present case on May 31, 2007 and made the same allegations as he did on the March 25, 2005 application with regard to his last dates of employment. On October 25, 2007 an evidentiary hearing was held to allow the parties to submit any new information, and specifically medical evidence, regarding the Petitioner's claim occurring since the prior hearing. Amended Findings of Fact and Interim Order was issued on January 31, 2008. In this Order I again made a finding of fact as follows: "The Petitioner last worked sometime in July 2000 and a more precise date was not put into evidence."

After the report came back from the medical panel I issued Findings of Fact Conclusions of Law and Order for Subsistence Benefits on September 30, 2008, awarding the Petitioner permanent total disability compensation. I again made the finding "The Petitioner last worked sometime in July 2000 and a more precise date was not put into evidence." At the conclusion of

¹ There is distortion from the microphones used in the courtrooms at the time. None of the "inaudibles" lasted longer than one second.

ORDER

Denny Carradine, Case No. 07-0490

Page 3

this Order I wrote "IT IS HERewith ORDERED THAT the [Respondents] shall pay the Petitioner subsistence benefits in the amount of \$292.00 per week beginning August 1, 2000 . . ." (Emphasis added.)

On November 10, 2008 ERF filed a letter requesting that certain amendments be made to the 9/30/08 order. On November 17, 2008 ERF filed a formal Motion for Review. WCF joined in the Motion for Review, requesting that it be credited with having already paid specific amounts of benefits. Mr. Potter also filed a letter requesting that he be awarded costs of \$750 for the appearance of Dr. Mary K. Hales at the hearing. The parties pointed out that I had failed to analyze the case under the permanent total disability statute as it was in 1988.

I reviewed the motions and determined to correct the statutory analysis and make specific new findings regarding the Respondents' respective financial liability. The parties were given time to address any objections to each others' evidence and arguments. An Amended Findings of Fact and Conclusions of Law was issued on April 30, 2009. For the fourth time, I made the finding of fact "The Petitioner last worked sometime in July 2000 and a more precise date was not put into evidence." At the conclusion of this Order I wrote "The evidence shows that the Petitioner did not return to work after 'July 2000' and that the Petitioner was permanently totally disabled at that time. Thus I conclude the 312 week period begins August 1, 2000."

It is only now that the Petitioner makes a claim that his permanent total disability compensation should begin in 1992. He argues that because the Commission has continuing jurisdiction over claims, the record should be re-opened to take evidence of when the Petitioner became permanently and totally disabled. This motion is opposed by the Employers' Reinsurance Fund.

The Commission has previously issued decisions regarding the issue of whether the evidentiary record may be reopened in a case. In the case of Ron Benson v. Lucent Technologies, Case No. 04-0529, Mr. Benson sought admission of additional medical records upon the filing of his Motion for Review. In an Order Denying Motion for Review issued January 10, 2006, the Commission reviewed the applicable statutory provisions:

Section 63-46b-8 of the Utah Administrative Procedures Act ("UAPA") requires that ALJ's conduct evidentiary hearings "to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their position." Section 63-46b-10(1)(a) of UAPA requires that an ALJ's decision must include "a statement of . . . findings of fact based exclusively on the evidence of record." Furthermore, Section 34A-1-303 of the Utah Labor Commission Act allows review of an ALJ's decision based on "the evidence previously submitted in the case." (Emphasis in original). These provisions, taken together, establish a clear requirement that parties submit their evidence during the evidentiary hearing. This requirement is necessary both as a matter of fairness and of practicality.

ORDER

Denny Carradine, Case No. 07-0490

Page 4

The Commission determined the records would not be admitted, because the medical records Mr. Benson sought to have admitted had been prepared by his own physicians, well in advance of the evidentiary hearing, and because Mr. Benson gave no reason why they could not have been presented at the hearing.

In the case of Shirley Hallman v. Kennecott Utah Copper Corporation, the Appeals Board quoted a Utah Supreme Court case, United Airlines v. Industrial Commission, 175 P.2d 752,754 (Utah 1946):

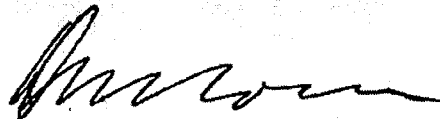
The Industrial Commission should not reopen a case merely for the purpose of hearing cumulative or corroborative evidence; but when new evidence is available, or new issues have arisen, then their power to reconsider the case is not curtailed.

In this case the Appeals Board determined that the case should be reopened because of evidence discovered after the hearing which showed the Petitioner had lied during her deposition and hearing testimony, which, combined with other factors, resulted in the Respondent's deprivation of critical medical evidence. Newly discovered evidence, which had not been available beforehand because of deception, needed to be heard to preserve the integrity of the process, and the record was re-opened.

In the present case, the Petitioner correctly points out that he was not able to testify at the April 2006 hearing because of his seizure. However, he was on notice of my finding that his last work was in July 2000 with every substantive order issued after that hearing. He has had three years to correct that finding, which specifically alerted everyone of a lack ("a more precise date was not put into evidence.") He has not given any reason why he could not have brought the issue up at the October 25, 2007 hearing or later and does not allege that he has new evidence bearing on the issue that could not have been discovered earlier. It is for these reasons that I decline to re-open the record to take evidence of the start date for permanent total disability compensation.

IT IS THEREFORE ORDERED that the Petitioner's motion to re-open the evidentiary record is denied. The case shall be sent to the Commission for consideration upon the Petitioner's full Motion for Review.

DATED THIS July 27, 2009.



Deidre Marlowe
Administrative Law Judge

Denny Carradine vs. True Flo Mechanical Sys Inc and/or Workers Compensation Fund;
EMPLOYERS REINSURANCE FUND Case No. 07-0490

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached ORDER was mailed by prepaid U.S. postage on July 27, 2009, to the persons/parties at the following addresses:

Denny Carradine
578 S Redwood Rd
Salt Lake City UT 84104

True Flo Mechanical Sys Inc
578 S Redwood Rd
Salt Lake City UT 84104

Employers Reinsurance Fund
160 E 300 S
P O Box 146611
Salt Lake City UT 84114

Workers Compensation Fund
Dennis V Lloyd Designated Agent
392 E 6400 S
Salt Lake City UT 84107

Shawn W Potter Esq
Tesch Law 314 Main St #200
Box 3390
Park City UT 84060

Hans Scheffler Esq
392 E 6400 S
Salt Lake City UT 84107

Wendy B Crowther Esq
201 S Main St Ste 1300
Salt Lake City UT 84111

UTAH LABOR COMMISSION



Clerk
Adjudication Division

Attachment H

UTAH LABOR COMMISSION

DENNY CARRADINE,

Petitioner,

vs.

TRUE FLO MECHANICAL SYSTEMS,
INC. , WORKERS COMPENSATION
FUND and EMPLOYERS REINSURANCE
FUND,

Respondents.

ORDER DENYING REQUEST
FOR RECONSIDERATION

Case No. 07-0490

Denny Carradine asks the Utah Labor Commission to reconsider its previous decision affirming Administrative Law Judge Marlowe's determination of the date that Mr. Carradine is entitled to begin receiving permanent total disability compensation under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this matter pursuant to § 63G-4-302 of the Utah Administrative Procedures Act.

BACKGROUND AND ISSUES PRESENTED

In summary, Judge Marlowe held an evidentiary hearing on Mr. Carradine's claim and then awarded him permanent total disability compensation for injuries from a work accident at True-Flo on September 2, 1988. Based on the evidence and representations presented at the hearing, Judge Marlowe ordered that payment of such compensation commence as of August 1, 2000.

Mr. Carradine then asked the Commission to review Judge Marlowe's decision. Specifically, Mr. Carradine argued that he had not been gainfully employed since July 1992 and that his disability compensation should begin then, instead of August 2000 as ordered by Judge Marlowe. The Commission rejected Mr. Carradine's argument and affirmed Judge Marlowe's order. In reaching its decision, the Commission noted that the existing record supported Judge Marlowe's order and that Mr. Carradine had not proffered any documentation supporting his claim that his benefits should commence at an earlier date.

Mr. Carradine now asks the Commission to reconsider its decision. As part of this request, Mr. Carradine has submitted his own affidavit describing limitations to his ability to work after July 1992.

RECEIVED
OCT 02 2000

TESCH LAW OFFICES P.C.

ORDER DENYING REQUEST FOR RECONSIDERATION
DENNY CARRADINE
PAGE 2 of 4

DISCUSSION

Section 63-46b-8 of the Utah Administrative Procedures Act ("UAPA") requires that ALJs conduct evidentiary hearings "to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions." Section 63-46b-10(1) (a) of UAPA requires that an ALJ's decision must include "a statement of . . . findings of fact based exclusively on the evidence of record." Section 34A-1-303 of the Utah Labor Commission Act allows review of an ALJ's decision based on "the evidence previously submitted in the case." (Emphasis added.) These provisions, taken together, establish a clear requirement that parties to adjudicative proceedings at the Commission submit their evidence during the evidentiary hearing. This requirement is necessary both as a matter of fairness and of practicality.

In this case, Mr. Carradine did not submit evidence during the evidentiary hearing to prove that he could not work after 1992. Even later, in his motion for review to the Commission, he did not submit such evidence. While he has now proffered some evidence on that point—in the form of his own affidavit-- it is apparent that such an affidavit or other, more persuasive evidence could have been submitted at the evidentiary hearing. The Commission therefore declines to accept Mr. Carradine's untimely proffer of evidence.

The Commission notes Mr. Carradine's additional argument that the Commission should exercise its continuing jurisdiction under § 34A-2-420(1) of the Act to reopen Mr. Carradine's claim and consider his new evidence. This argument overstates the scope of the Commission's continuing jurisdiction, which is intended to allow the Commission to consider new developments in a claim but does not extend so far as to allow an unsuccessful party to retry a claim simply because that party failed to submit all the evidence that could have been submitted at the original hearing.

In summary, the Commission concludes that the existing record supports the Commission's previous decision in this matter. The Commission declines to consider the new evidence Mr. Carradine has proffered as part of his request for reconsideration.

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**ORDER DENYING REQUEST FOR RECONSIDERATION
DENNY CARRADINE
PAGE 3 of 4**

ORDER

The Commission affirms its prior decision and denies Mr. Carradine's motion for review. It is so ordered.

Dated this 30th day of September, 2009.


Sherric Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

ORDER DENYING REQUEST FOR RECONSIDERATION
DENNY CARRADINE
PAGE 4 of 4

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Reconsideration in the matter of Denny Carradine, Case No. 07-0490, was mailed, first class, postage prepaid this 30th day of September, 2009, to the following:

Denny Carradine
578 S Redwood Rd
Salt Lake City UT 84104


True Flo Mechanical Sys Inc
578 S Redwood Rd
Salt Lake City UT 84104

Employers Reinsurance Fund
160 E 300 S
P O Box 146611
Salt Lake City UT 84114

Shawn W Potter Esq
Tesch Law 314 Main St #200
Box 3390
Park City UT 84060

Hans Scheffler Esq
392 E 6400 S
Salt Lake City UT 84107

Wendy B Crowther Esq
201 S Main St Ste 1300
Salt Lake City UT 84111


for: Sara Danielson
Utah Labor Commission

Attachment I

UTAH LABOR COMMISSION

DENNY CARRADINE,

Petitioner,

vs.

**TRUE FLO MECHANICAL SYSTEMS,
INC. , WORKERS COMPENSATION
FUND and EMPLOYERS REINSURANCE
FUND,**

Respondents.

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 07-0490

Denny Carradine asks the Utah Labor Commission to review Administrative Law Judge Marlowe's determination of the date on which Mr. Carradine is entitled to begin receiving permanent total disability compensation under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Carradine claims permanent total disability compensation from True Flo Mechanical Systems and its insurance carrier, Workers' Compensation Fund, (referred to jointly as "True-Flo" hereafter) and the Employers' Reinsurance Fund ("ERF") for injuries from a work accident at True-Flo on September 2, 1988.

The documents Mr. Carradine submitted as part of his claim stated, among other things, that he had worked intermittently after the date of injury and had remained employed until 2001. During the evidentiary hearing on Mr. Carradine's claim, his attorney represented to Judge Marlowe that Mr. Carradine had worked until July 2000. Mr. Carradine was incapacitated at the time of the hearing and did not testify.

Judge Marlowe ultimately concluded that Mr. Carradine was entitled to permanent total disability compensation. In fixing the date on which such compensation would begin, Judge Marlowe accepted the representation of Mr. Carradine's attorney that Mr. Carradine had not worked after July 2000. On that basis, Judge Marlowe ordered True-Flo to begin payment of permanent total disability compensation on August 1, 2000, with ERF to assume liability for such payments on August 1, 2006.

ORDER AFFIRMING ALJ'S DECISION
DENNY CARRADINE
PAGE 2 OF 3

Mr. Carradine has now submitted a motion for review of Judge Marlowe's decision in which he asserts for the first time that he was last gainfully employed in July 1992. He asks that his award of permanent total disability compensation be amended to commence as of August 1992, or, alternatively, that his claim be reopened to allow presentation of additional evidence on this issue.

DISCUSSION AND CONCLUSION OF LAW

In considering whether to grant either of Mr. Carradine's requests, the Commission notes that Mr. Carradine has not proffered any documentary evidence or affidavit to support his contention that he was not gainfully employed after July 1992. Furthermore, that contention is directly contradicted by Mr. Carradine's earlier written submissions and by the representations of his attorney at the evidentiary hearing. Mr. Carradine has not explained these contradictions. Under these circumstances, the Commission finds insufficient basis to either modify the terms of Judge Marlowe's order or to reopen this matter for further evidentiary proceedings.

ORDER

The Commission affirms Judge Marlowe's order and denies Mr. Carradine's motion for review. It is so ordered.

Dated this 30th day of July, 2009.



Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER AFFIRMING ALJ'S DECISION
DENNY CARRADINE
PAGE 3 OF 3

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Denny Carradine, Case No. 07-0490, was mailed first class postage prepaid this 31st day of July, 2009, to the following:

Denny Carradine
578 S Redwood Rd
Salt Lake City UT 84104


True Flo Mechanical Sys Inc
578 S Redwood Rd
Salt Lake City UT 84104

Employers' Reinsurance Fund
160 E 300 S
P O Box 146611
Salt Lake City UT 84114

Shawn W. Potter, Esq.
Tesch Law 314 Main St #200
Box 3390
Park City UT 84060

Hans Scheffler, Esq.
Workers Compensation Fund
392 E 6400 S
Salt Lake City UT 84107

Wendy B. Crowther, Esq.
201 S Main St Ste 1300
Salt Lake City UT 84111



Sara Danielson
Utah Labor Commission

Attachment J


Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Conclusions of Law. This petition seeks review of that portion of the Order Affirming the ALJ's Decision that denied Mr. Carradine the right to an additional evidentiary hearing or the ability to present additional evidence regarding his last date of gainful employment—due to the fact that Mr. Carradine had a seizure during the original evidentiary hearing and was unable to present the evidence himself. Mr. Carradine seeks review of the order denying the request for reconsideration that declined to accept the proffer of evidence, by affidavit of Mr. Carradine, regarding his ability to present full evidence of his employment history and lack of gainful employment between the date of the original industrial accident and his last day of employment.

Petitioner requests the court to direct the respondent to prepare and certify to the court its entire record, which shall include all of the proceedings and evidence taken in this matter.

DATED this 30th day of October, 2009.

TESCH LAW OFFICES, P.C.


Shawn W. Potter

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Review in the matter of Denny Carradine, Case No. 07-0490, was mailed, first class, postage prepaid this 31st day of October, 2009, to the following:

Denny Carradine
578 S. Redwood Road
Salt Lake City, UT 84104

True Flo Mechanical Sys Inc
578 S. Redwood Road
Salt Lake City, UT 84104

Employers Reinsurance Fund
PO Box 146611
Salt Lake City, UT 84114

Hans Sheffler
392 E 6400 S
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Wendy B Crowther
201 S. Main Street, # 1300
Salt Lake City, UT 84111

Utah Attorney General
Capitol Complex E # E320
Salt Lake City UT 84114



Attachment K

Shawn W. Potter, 9551
Tesch Law Offices, P.C.
314 Main St Suite 200
PO Box 3390
Park City, UT 84060

Denny Carradine,
Petitioner

DOCKETING STATEMENT

Appeal No. 20090907

Utah Labor Commission, Workers
Compensation Fund, Employers
Reinsurance Fund,
Respondents.

Agency Decision No. 07-0490

1. **Nature of the proceeding.** This appeal is from a final judgment and order of the Utah Labor Commission.

2. Jurisdiction. This Court has jurisdiction pursuant to Utah Code Ann. §78A-4-103 (2) (a).

3. Relevant dates. a. The final order appealed from was entered September 30, 2009.

b. Date the Petition for Review was filed: October 30, 2009.

c. (1) Date any motions filed pursuant to Rules 50(b), 52(b), or 59, Utah Rules of Civil Procedure, Rule 24, Utah Rules of Criminal Procedure, or Utah Code Ann. § 77-13-6 were filed: No such motions were filed.

(2) Date and effect of any orders disposing of such motions: No such motions were filed.

4. Inmate mailbox rule. The appellant is not an inmate confined in an institution invoking rule 4(f).

5. Rule 54(b). This appeal is not from an order in a multiple party or a multiple claim case in which the judgment has been certified as a final judgment by the trial court pursuant to Rule 54(b), Utah Rules of Civil Procedure.

6. Criminal cases. This is not a criminal case.

7. Issues on appeal. Appellant intends to assert the following issues on appeal:

a. Issue: Whether the Labor Commission erred in its refusal to accept evidence or re-open the hearing regarding the time period of Petitioner's gainful employment when Petitioner suffered a seizure in the hearing itself and was unable to testify regarding the same.

Determinative law: § 34A-2-420(1)(a-b) (Utah Code Ann. 2009); R602-2-1 (M)

(1) (a); Color Country Management v. Labor Com'n, 38 P.3d 969 (Utah App.

2001); *United Airlines v. Industrial Commission*, 175 P.2d 752 (Utah 1946);

Standard of review: The Court applies an “intermediate standard of review, deferring to an agency’s interpretation as long as it is both reasonable and rational...” *Westside Dixon Associates LLC v. Utah Power & Light Co./PacifiCorp*, 44 P.3d 775 (Utah,2002). See also *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah,2007), citing § 63-46b-16(4)(d) (Utah Code Ann.): The Utah Administrative Procedures Act allows relief when “the agency has erroneously interpreted or applied the law.”

b. Issue: Whether the Labor Commission erred in establishing, as a factual matter, the last date of gainful employment based on the facts received.

Determinative Law: § 34A-2-413, § 34A-2-413 (1) (b) (3), § 34A-2-802, Utah Code Ann. R602-2-1 (M) (1) (a); *Marshall v. Industrial Commission of State of Utah*, 681 P.2d 208 (Utah 1984). *Peck v. Eimco Process Equipment Co.*, 748 P.2d 572 (Utah 1987). *Norton v. Industrial Comm’n*, 728 P.2d 1025 (Utah 1986).

Standard of Review: The standard of review is substantial evidence. *Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints*, 164 P.3d 384 (Utah,2007), citing § 63-46b-16(4)(g): Subsection (4)(g) allows relief when “the agency action is based on a determination of fact ... that is not supported by substantial evidence when viewed in light of the whole record before the court.”

Id.

c. Issue: Whether the Labor Commission erred in refusing to accept post-hearing evidence of Petitioner's time of any gainful employment under the Labor Commission's continuing jurisdiction over workers compensation claims.

b. Determinative Law: § 34A-2-420(1)(a-b), § 34A-2-802 (Utah Code Ann.); R602-2-1 (M) (1) (a); Color Country Management v. Labor Com'n, 38 P.3d 969, 974-75 (Utah Ct. App. 2001).

c. Standard of Review: Statutory interpretations by agencies are reviewed for correctness, giving no deference to the agency's interpretation..." Employers' Reinsurance Fund v. Industrial Com'n of Utah, 856 P.2d 648 (Utah Ct.App.,1993).
See also Martinez v. Media-Paymaster Plus/Church Of Jesus Christ Of Latter-Day Saints, 164 P.3d 384 (Utah,2007), citing § 63-46b-16(4)(d) (Utah Code Ann.):

The Utah Administrative Procedures Act allows relief when "the agency has erroneously interpreted or applied the law."

8. Factual Summary.

Petitioner Denny Carradine suffered a severe knee injury when he fell from a ladder at work for his own company on September 2, 1988. Petitioner received workers compensation benefits and engaged in rehabilitation efforts. In January, 1989, while attending a rehabilitation appointment, he slipped on ice and suffered

a substantial shoulder injury. As treatment for the shoulder injury Carradine received two steroid shots, after one of which he suffered a neurological/psychological injury. Carradine made a claim at the Utah Industrial Commission and he was adjudicated permanently partially disabled. *See Findings of Fact and Conclusions of Law and Order, Issued June 5, 1992, by Judge Barbara Elicerio at page 4, attached hereto.* Carradine was able to obtain some work after the injury, but it was not gainful employment. Before his accident and for a short time after, from 1982-1990, Carradine had a real estate license. He had to not renew the license because he could no longer do the things required of a real estate agent including: writing, spelling, tracking business, and providing customer service. For several years, he was able to collect some rent from properties that he owned, but was unable to survive on the income generated from rental properties and was forced to take loans against his properties and eventually sell some of his properties. In 1997 he worked for his brother for only a short time as a carpenter's helper, but was fired after two months because he was incapable of doing the work. From 1998-2000, Carradine worked for Cressfarms, LLC as a project manager. Carradine was given this job as a favor from a friend. For a period he lived on the Cressfarms property. After a falling out with his friend he was no longer employed.

Petitioner's neurological/psychological condition had continued to worsen and in March, 2005, Petitioner filed a claim for permanent total disability (Case No. 05-0292).

At Petitioner's hearing, Petitioner had a seizure and was unable to testify at all and therefore was unable to provide testimony regarding his employment history and gainful employment. An expert neuropsychologist, Dr. Mary Hales, testified at the hearing regarding Petitioner's neurological/psychological injuries. At the time of the hearing Dr. Hales had performed all testing of Petitioner but had not yet prepared a written report. Dr. Hales' written report was submitted to Judge Marlowe and all other parties on November 15, 2006 (stating, among other things, that Petitioner has been unable to work since 1991). The matter was submitted to a medical panel. Due to Petitioner's neurological/psychological disability, he was unable to meet with the medical panel and Petitioner's case was dismissed without prejudice. Petitioner refiled the matter (Case No. 07-0490), and Judge Marlowe required, in an October 12, 2007, letter, that she would not allow evidence "which was available at the time of the prior hearing, but not presented." The matter then went to the medical panel. The medical panel determined that Petitioner's current condition was an extension of his previously adjudicated brain and psychological injury. The medical panel also stated that Petitioner last worked in 1990. Judge

Marlowe issued a Findings of Fact and Conclusions of Law on September 30, 2008, establishing that petitioner was permanently and totally disabled. On approximately November 10, 2008, the Employers Reinsurance Fund ("ERF") filed a letter requesting amendments to the September 30, 2008 Order. Separately, on November 17, 2008, the ERF filed a formal Motion for Review regarding payment of certain benefits. The Workers Compensation Fund ("WCF") joined the motion to modify other amounts. At a later point in time, Petitioner discovered that the date established by Judge Marlowe as the date from which his benefits would be paid was in error as he had only been intermittently and not gainfully employed since 1992. Petitioner then filed his own Motion for Review seeking to re-open the hearing to allow the acceptance of evidence regarding dates of gainful employment prior to July 2000. The Motion was denied and Petitioner filed a Request for Reconsideration attaching an affidavit regarding dates of employment—which was also denied. Petitioner continues to maintain that he was not gainfully employed between the date of the injury, the 1992 Industrial Commission Proceedings, and July 2000.

9. Assignment. This appeal is not subject to transfer by the Supreme Court to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4).

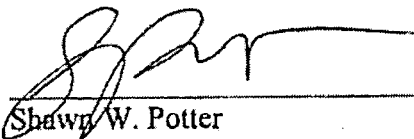
10. Related appeals. There are no related appeals.

11. Attachments. The following are attached:

- A. Report of Dr. Mary Hales
- B. Findings of Fact and Interim Order
- C. Order of Dismissal
- D. Letter from Judge Marlowe
- E. Report of Medical Panel.
- F. Findings Of Fact And Conclusion Of Law, Dated September 30, 2008.
- G. Order of July 28, 2009.
- H. Order Denying Request For Reconsideration, Dated September 30, 2009.
- I. Oder Affirming Alj's Decision, Dated July 30, 2009.
- J. The Petition for Review, Dated October 30, 2009.

DATED this 19th day of November, 2009.

TESCH LAW OFFICES, P.C.


Shawn W. Potter

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Docketing Statement in the matter of Denny Carradine,
was mailed first class postage prepaid this, 19th day of November, 2009, to the following:

True Flo Mechanical Sys Inc
578 S Redwood Rd
Salt Lake City UT 84104

Employers Reinsurance Fund
160 E 300 S
P O Box 146611
Salt Lake City UT 84114

Utah Attorney General
Capitol Complex E #E320
Salt Lake City, UT 84114

Hans Scheffler Esq
392E 6400 S
Salt Lake City UT 84107

Wendy B Crowther Esq
201 S Main St Ste 1300
Salt Lake City UT 84111

_____



POWELL POTTER & POULSEN

ATTORNEYS AND COUNSELORS AT LAW

VIA FAX: 801-678-3999

November 29, 2010

Utah Court of Appeals
Attn: Nicole
P.O. Box 140230
Salt Lake City, UT 84114-0230

Re: Carradine vs. Labor Commission Appellate Case No. 20090907

Dear Nicole:

As we discussed by telephone this afternoon, due to an error in preparation of the Brief of the Appellant, which was filed this afternoon a few of the record citations were not properly made in the Section B, Course of the Proceedings & Disposition of the Case and Section C, Statement of the Facts. Enclosed is a properly cited section of the same for insertion into the briefs that were filed earlier this afternoon.

Sincerely,
Powell Potter & Poulsen, PLLC



Shawn W. Potter

B. Course of the Proceedings & Disposition of the Case

At Petitioner's hearing, Petitioner had a seizure and was unable to testify at all and therefore was unable to provide testimony regarding his employment history and gainful employment. An expert neuropsychologist, Dr. Mary Hales, testified at the hearing regarding Petitioner's neurological/psychological injuries. At the time of the hearing Dr. Hales had performed all testing of Petitioner but had not yet prepared a written report. Dr. Hales' written report was submitted to Judge Marlowe and all other parties on November 15, 2006 and became part of the record. The report stated, among other things, that Petitioner has been unable to work since 1991 (Record page 44). The matter was submitted to a medical panel. Due to Petitioner's neurological/psychological disability, he was unable to meet with the medical panel and Petitioner's case was dismissed without prejudice. Petitioner refiled the matter (Case No. 07-0490), and Judge Marlowe required, in an October 12, 2007, letter, (Record page 00076), that she would not allow evidence "which was available at the time of the prior hearing, but not presented." The matter then went to the medical panel. The medical panel determined that Petitioner's current condition was an extension of his previously adjudicated brain and psychological injury. The medical panel also stated that Petitioner last worked in 1988 (See record page 100). Judge Marlowe issued a Findings of Fact and Conclusions of Law on September 30, 2008, Record pages 105-120, establishing that petitioner was permanently and totally disabled as a result of the original industrial injury. On approximately November 10, 2008, (record page 134) the Employers Reinsurance Fund

(“ERF”) filed a letter requesting amendments to the September 30, 2008 Order.

Separately, on November 17, 2008, the ERF filed a formal Motion for Review regarding the factual issue of payment of certain benefits. Record pages 135-138. The Workers Compensation Fund (“WCF”) joined the motion to modify other fact issues, including amounts paid to Petitioner over time. At a later point in time, Petitioner discovered that the date established by Judge Marlowe as the date from which his benefits would be paid was in error as he had only been intermittently and not gainfully employed since 1992. Petitioner then filed his own Motion for Review seeking to re-open the hearing to allow the acceptance of evidence regarding dates of gainful employment prior to July 2000. Record pages 166-170. The Motion was denied and Petitioner filed a Request for Reconsideration attaching an affidavit regarding dates of employment—which was also denied. Record page 189-206. Petitioner continues to maintain that he was not gainfully employed between the date of the injury, the 1992 Industrial Commission Proceedings, and July 2000, and that he should be compensated for that time period.

C. Statement of the Facts

Petitioner Denny Carradine suffered a severe knee injury when he fell from a ladder at work for his own company on September 2, 1988. Petitioner received workers compensation benefits and engaged in rehabilitation efforts. In January, 1989, while attending a rehabilitation appointment, he slipped on ice and suffered a substantial shoulder injury. As treatment for the shoulder injury Carradine received two steroid shots, after one of which he suffered a neurological/psychological injury. Carradine

made a claim at the Utah Industrial Commission and he was adjudicated permanently partially disabled. *See Findings of Fact and Conclusions of Law and Order*, Issued June 5, 1992, by Judge Barbara Elicerio at page 4, attached hereto. Carradine was able to obtain some work after the injury, but it was not gainful employment. Record p. 166, 190. Before his accident and for a short time after, from 1982-1990, Carradine had a real estate license. Record p. 192. He had to not renew the license because he could no longer do the things required of a real estate agent including: writing, spelling, tracking business, and providing customer service. Record p. 194. For several years, he was able to collect some rent from properties that he owned, but was unable to survive on the income generated from rental properties and was forced to take loans against his properties and eventually sell some of his properties. Record p. 193. In 1997 he worked for his brother for only a short time as a carpenter's helper, but was fired after two months because he was incapable of doing the work. Record p. 198. From 1998-2000, Carradine worked for Cressfarms, LLC as a project manager. Record p. 198. Carradine was given this job as a favor from a friend. Record p. 198. For a period he lived on the Cressfarms property. Record p. 198. After a falling out with his friend he was no longer employed.

Petitioner's neurological/psychological condition and memory continued to worsen and in March, 2005, Petitioner filed a claim for permanent total disability (Case No. 05-0292).